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Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS L. JONES, AS TREASURER,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the limitations imposed by 2 U.S.C. § 441a(d) of the Federal Election Campaign Act ("FECA" or "Act") on the right of political parties to make expenditures "in connection with the general election campaign of a candidate" violate the First Amendment to the United States Constitution, either facially or as applied?

2. Should the limitations that § 441a(d)(3) places on "any expenditure in connection with the general election campaign of a candidate" be construed to restrict a political party's advertising "that involves a clearly identified candidate and an electioneering message," even where, as here, (i) the party has not coordinated with its candidate (or even selected a candidate), (ii) the self-proclaimed "candidate" that is "involved" in the political advertisement is an incumbent congressman and has not been nominated by the opposing party, and (iii) the supposed "electioneering message" does not include "express advocacy" of the election or defeat of anyone, but merely makes statements that a reasonable person might regard as tending to "diminish" support for the "candidate"?

3. Did the United States Court of Appeals for the Tenth Circuit err in giving *Chevron* deference to two advisory opinions of the Federal Election Commission where (i) FECA, 2 U.S.C. § 437(b), forbids the Commission to establish any "rule of law" without following rulemaking procedures, and (ii) the two opinions give no explanation of their conflict with an earlier opinion?

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PETITION FOR WRIT OF CERTIORARI

The Colorado Republican Federal Campaign Committee and Douglas L. Jones as Treasurer[1] respectfully petition this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The September 6, 1995, order of the court of appeals denying the Colorado Party's suggestion for rehearing *en banc*, with three judges favoring rehearing and one recusal, is unreported and is reproduced at Appendix ("App.") 1a-2a bound with this

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[1] All parties to this case are identified in the caption. The Treasurer is a nominal party. For simplicity, the petitioners will be referred to collectively as "Colorado Party" or "Party." In papers below, the term "State Party" was sometimes used.

petition. The June 23, 1995 panel opinion reversing the district court is reported at 59 F.3d 1015 and is reproduced at App. 5a-21a. The August 30, 1993 order and memorandum of decision of the United States District Court for the District of Colorado dismissing the complaint of the Federal Election Commission ("FEC" or "Commission") is reported at 839 F. Supp. 1448 and is reproduced at App. 22a-37a.

JURISDICTION

The court of appeals entered judgment in this case on June 23, 1995. On September 6, 1995, the court of appeals denied the Colorado Party's suggestion for rehearing *en banc*. This petition is being filed within 90 days of the date the court of appeals entered judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

The statute involved in this case is the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), 2 U.S.C. §§ 441a(d) (1988), 437f(b) (1988), and 437f(c)(1) (1988). The statutory provisions are set out in their entirety at App. 80a-89a.

STATEMENT OF THE CASE

In the Spring of 1986, the Colorado Party publicly criticized statements by then-incumbent Democratic Congressman Tim

Wirth. At this time, the November, 1986 general elections were over six months away and neither party had selected a nominee for the United States Senate. However, Congressman Wirth had indicated his intent to seek the Democratic Party's nomination for Senate and was using the resultant publicity to advance his political agenda.

The Colorado Party produced and aired *three* radio advertisements and published *two* pamphlets challenging the veracity of Congressman Wirth's statements. App. 93a-106a. Consistent with FECA, donors to the Colorado Party were publicly disclosed, the funds did not come from corporations or unions, and contributions were limited to no more than $5,000 per contributing individual.

One of the three Colorado Party's radio advertisements, entitled "Wirth Facts #1," which ran in early April, stated in full:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

App. 93a. The text of the other advertisements, all of which are very similar, appear at App. 94a-106a.

On June 12, 1986, the Colorado Democratic Party complained to the FEC alleging that the Colorado Party's expenditures to air the radio messages and publish the pamphlets exceeded the Colorado Party's expenditure limits under § 441a(d)(3) of FECA. That provision limits expenditures that a

national or state party can make "in connection with the general election campaign of candidates for Federal office." App. 85a-86a. More than two years later, the FEC concluded, by a vote of 5-1, that the cost of "Wirth Facts #1" constituted expenditures which, when aggregated with the Colorado Party's other spending, exceeded the limit of § 441a(d)(3). App. 56a-61a. The FEC dismissed the allegations regarding the other two radio ads and the two pamphlets because of a 3-3 deadlock vote.[2]

On July 5, 1989, the FEC filed a *de novo* civil action in the United States District Court for the District of Colorado seeking to fine the Colorado Party. App. 38a-47a. On August 30, 1993, the district court granted the Colorado Party's motion for summary judgment and dismissed the FEC's complaint. App. 22a-37a. Drawing on this Court's precedent construing the term "in connection with" under the FECA, the district court ruled that § 441a(d)(3) limits only expenditures for "express advocacy" and that "Wirth Facts #1" did not expressly advocate the election or defeat of any candidate. App. 28a-35a. The district court also ruled *sua sponte* that the Colorado Party's counterclaim that § 441a(d)(3) was unconstitutional was "moot" and dismissed the Colorado Party's constitutional challenge. App. 35a-36a.

On appeal, a panel of the United States Court of Appeals for the Tenth Circuit reversed and remanded and instructed the district court to enter judgment in favor of the FEC and to determine an appropriate civil penalty. App. 21a. "Giving deference to the FEC's interpretation," the panel ruled (App. 16a-17a) that § 441a(d)(3)'s "in connection with the general election campaign" language applies to party spending that "involves a clearly identified candidate and an electioneering message, without regard to whether that message constitutes express advocacy."

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[2] The FEC needs the votes of four commissioners to proceed. *See* 2 U.S.C. § 437c(c) (1988).

The panel ruled (App. 17a) that "Wirth Facts #1" was directed at a clearly identified candidate because Mr. Wirth had informed the FEC of his intent to seek a Senate seat, even though he had not been nominated by his party. It also ruled (App. 17a-19a) that the advertisement contained an electioneering message, despite the fact that the advertisement aired months before either party selected its Senate nominee. The panel based this ruling (App. 18a) on its view that a reasonable person would think that the advertisement tended to "diminish" public support for Mr. Wirth and to "garner support" for "the unnamed [and unselected] Republican nominee." The panel was silent as to how "Wirth Facts #1" differed from the Colorado Party's other radio ads and published pamphlets concerning Congressman Wirth which the FEC had determined were not subject to § 441a(d)(3)'s expenditure limitations.

The court of appeals rejected the Colorado Party's as applied and facial constitutional challenges to § 441a(d)(3). App. 19a-21a. Noting that the "primary purpose" of the contribution and expenditure limitations in the Act is to "prevent corruption or the appearance of corruption," the panel stated (App. 20a) that "[t]he same reasoning the Supreme Court [has] used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees." Despite the FEC's failure to present any credible evidence that state parties corrupt candidates for federal office — and the Colorado Party's production of affirmative evidence to the contrary — the court of appeals, without citation or evidence, concluded (App. 20a) that

> party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures.

Ironically, the Colorado Party is being prosecuted by the government for criticizing an "incumbent officeholder."

Lacking factual support for a corruption rationale, the panel (App. 20a-21a) upheld the constitutionality of § 441a(d)(3) in part because the restrictions on political party expenditures " 'equalize the relative ability of all citizens to affect the outcome of elections' " and help "cap campaign costs and increase accessibility to our political system." The panel (App. 21a) mistakenly relied on *Buckley v. Valeo*, 424 U.S. 1, 56-67 (1976), per curiam, which in fact rejected these grounds.

On August 7, 1995, the Colorado Party timely filed a suggestion for rehearing *en banc*. Four days later, the court of appeals ordered the FEC to file a response to the Party's suggestion (App. 3a). On September 6, 1995, a divided court of appeals denied the Colorado Party's suggestion (App. 1a-2a). Judges Baldock, Ebel and Kelly voted to grant rehearing *en banc*, and Judge Lucero was recused (App. 2a).

The court of appeals' ruling deeply and unjustifiably impairs the Colorado Party's First Amendment rights of association and expression. The Party now seeks a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

Few matters of federal law can be more important than those establishing how our political system will operate and how our political representatives will be selected. Such matters are the subject of this petition.

This case presents a First Amendment challenge to an extraordinary statute, § 441a(d) of FECA, which directly but variously limits the ability of political parties to support their own candidates and officeholders or oppose candidates and officeholders from other parties. To this end, the statute imposes caps on the amount that can be spent by a party, with the amount per state varying with state population. Although the limitations nominally apply only to expenditures that are

coordinated with a party candidate, the statute is applied on the premise that *every* party expenditure is so coordinated.

The FEC claims that these restrictions are necessary because a party's influence over its candidates inherently is corrupting, but it has offered neither a congressional finding nor record evidence to support its claim. The court of appeals more accurately suggests (App. 20a-21a) that the restrictions were enacted to equalize the "voices" of competing political views and to reduce political expenditures overall; however this Court has rejected those objectives as a basis for curtailing First Amendment freedoms.

In *Buckley* 424 U.S. at 59, 60 n.67, this Court expressly reserved the question of whether § 441a(d)(3) violates the First Amendment, noting in response to question 3(e) that the First Amendment issues certified by the lower court with respect to § 608(f), now § 441a(d), had not been advanced by the appellants. This case presents that reserved First Amendment issue. It should be resolved.

This case is also important because of the sweeping construction given the challenged statute by the court of appeals. This Court and every other lower court to consider the issue uniformly have held that, to minimize concerns of overbreadth and vagueness, all references to expenditures "in connection with" a federal election and similar terms used in the FECA must be construed to apply only to the "express advocacy" of the election or defeat of an identified candidate.

In the present case, by contrast, the court of appeals ruled (App. 11a-12a) that political speech by political parties merits less protection than speech by banks, corporations, trade unions, and the like. Thus, the panel held (App. 16a-17a) that the statutory limitation on party expenditures in connection with an election should be read broadly to limit every party "electioneering message" that "involves a clearly identified candidate" "without regard to whether that message constitutes express advocacy."

The court of appeals (App. 17a) made clear that an office-holder can become a protected "candidate" merely by announcing that intent to the FEC, even though the party's nominating process has not even begun. Also, it made clear that an electioneering message is one that "would leave a reader (or listener) with the impression that [the sponsoring party] sought to 'diminish' public support for [the self-proclaimed candidate] and 'garner support' for the unnamed" future nominee of the speaking party (App. 18a). Thus, critical statements about the official performance of a congressman without any associated request to vote for or against anyone, are restricted. And the court of appeals found its test satisfied as to speech occurring in early April, even though the general election would not be until November.

Thus, so long as a member of the House of Representatives announces an intent to seek reelection, he or she can be largely shielded from critical commentary by the opposing party. Other office holders, by announcing a candidacy, will be similarly shielded. This unprecedented interference with the political speech of political parties goes to the heart of our system of governance and merits the consideration of this Court.

Finally, this case presents important issues of administrative and election law. The court of appeals here gave *Chevron* deference to a view arguably stated in two of three FEC advisory opinions, without considering that FECA prohibits the use of advisory opinions to establish rules of law.

I. SECTION 441a(d)(3) UNCONSTITUTIONALLY RESTRICTS THE COLORADO PARTY'S CORE FIRST AMENDMENT RIGHTS OF FREE SPEECH AND FREE ASSOCIATION.

The basic problem with a statute that, facially and as applied, restricts political speech by political parties, including speech intended to support party candidates, is that it strikes at the heart of the First Amendment. Even assuming such a statute could be justified, the evidence would have to be rigorous and compelling. No such justification has been offered here.

A. The Colorado Party's Expenditures To Advocate Election Of Its Candidates Are Protected Speech And Association At The Core Of the First Amendment.

"[S]ince virtually all meaningful political communications in the modern setting involve the expenditure of money," expenditures for political speech are speech protected at the core of the First Amendment. *Buckley*, 424 U.S. at 11; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citation omitted) ("[T]he use of funds to support a political candidate is 'speech' . . . 'at the core of our electoral process and of the First Amendment freedoms.' "). Thus, expenditures to discuss public officials and candidates for public office is afforded "the broadest protection" from governmental restriction. *Buckley*, 424 U.S. at 14.

The First Amendment also guarantees a core "right to associate with the political party of one's choice" and to work through such political associations "for the advancement of beliefs and ideas." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (citations omitted); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("[R]ight to associate with the political party of one's choice is an integral part of this basic constitutional freedom.")

First Amendment rights of free speech and association are mutually dependent, as "[t]he two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression," and vice versa. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) (striking ordinance limiting contributions to committees that favor or oppose ballot measures as an impermissible restraint on freedom of association).

B. Section 441a(d)(3) Severely Restricts The Colorado Party's Core First Amendment Rights.

Section 441a(d)(3) of the Act prohibits "a State committee of a political party, including any subordinate committee of

a State committee" from making "any expenditure in connection with the general election campaign of a candidate for Federal office" over a specified dollar amount.[3] This restriction on a State party's ability to advocate the election of its own candidate strikes at the very heart of the First Amendment's guarantees of free speech and association, for the primary way a political party can achieve its goals in the political process is to promote its candidates.[4]

In *Buckley*, the Court held that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." 424 U.S. at 19. The Court reasoned that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.*, at 19 n.18. *Buckley* leaves no doubt that "the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests." *Id.* at 23. The Court expressly reserved in *Buckley* the question of whether the expenditure limits imposed on political parties by § 441a(d) violate the First Amendment. *Id.* at 59 n.67.[5] The court of appeals acknowledged this. App. at 20a, n.11.

The First Amendment interests implicated here — the Colorado Party's right to spend its financial resources to advocate the election of its candidates or to oppose other candidates —

[3] The expenditure ceiling set by § 441a(d)(3) varies from state to state, and was $103,248.54 for the 1986 Senate election in Colorado. *See* FEC *Record* 1 (Apr. 1986).

[4] Freeman, *Political Party Contributions and Expenditures Under the Federal Election Campaign Act: Anomalies and Unfinished Business*, 4 Pace L. Rev. 267, 288 (1988) ("[T]o restrict [the parties'] . . . ability to support their candidates is to restrict the only form of political expression that has any meaning to a major political party.").

[5] The Court rejected a claim that 18 U.S.C. § 608(f), the predecessor of 2 U.S.C. § 441a(d), violated the Fifth Amendment. *Buckley*, 424 U.S. at 58-59 nn. 66 & 67. No First Amendment challenge to what is now § 441a(d) was before the Court in *Buckley*.

are much greater than those implicated by the contribution limits upheld in *Buckley*. In *Buckley*, the Court reasoned that a limit on the amount of a political *contribution* to a candidate is of comparatively less constitutional significance than an expenditure limitation because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley*, 424 U.S. at 21. "The quantity of communication . . . does not increase perceptibly with the size of [the] contribution," and "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

The limit on the Colorado Party's *expenditures* at issue here, by contrast, directly restricts the *quantity* and *quality* of the Colorado Party's political expression by forbidding the Colorado Party from communicating directly to the public its express support for its candidates.

The distinction between contributions and expenditures has led the Court to strike limits on "independent expenditures" as unconstitutional abridgments of the First Amendment in four contexts. *See Buckley*, 424 U.S. at 52 (striking limits on independent expenditures by individuals and by candidates); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497-501 (1985) (striking restrictions on independent expenditures by political action committees); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 268 (1986) (MCFL) (striking restrictions on independent expenditures by incorporated political organizations).

FEC regulations forbid the Colorado Party from making "independent expenditures."[6] The Colorado Party maintains

[6] 11 C.F.R. § 110.7(b)(4) (1995) bars party committees from making "independent expenditures." All party expenditures are by operation of law "coordinated expenditures," although not necessarily in fact "coordinated" with any candidate. In this case, there were no candidates for the Colorado Party to coordinate with because it was so early in the election year.

that it should be permitted to make unlimited "coordinated expenditures" in support of or in opposition to candidates just as other groups are permitted to make unlimited "independent expenditures." Yet all of the Colorado Party's expenditures in support of its congressional candidates are subject to the limitations contained in § 441a(d)(3). The result is ironic and illogical: The Colorado Party (like all state parties) is the only political group that does not have the right to spend unlimited amounts of money in support of its candidates. The restriction is as unconstitutional as are the restrictions on other groups' "independent expenditures."

C. The Restrictions Imposed By § 441a(d)(3) Serve No Compelling Governmental Interest.

The government bears the burden of proving that § 441a(d)(3)'s restriction on the Colorado Party's core First Amendment freedoms is strictly necessary to serve a compelling governmental interest and that the restriction is narrowly tailored to that interest. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 228 (1989); *National Conservative Political Action Comm.*, 470 U.S. at 498. Such a demonstration requires actual *evidence*; the government cannot meet its burden by merely asserting a "hypothetical possibility." *Buckley*, 424 U.S. at 498; *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995) ("*NTEU*").[7]

The *only* governmental interest recognized by the Court as sufficient to justify restrictions on political contributions is the

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[7] This past Term, this Court elaborated on the government's burden when it seeks to regulate core First Amendment Rights:

> [W]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease to be cured' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.

NTEU, 115 S. Ct. at 1017 (1995) (citation omitted).

prevention of actual or apparent corruption of elected officials. *Buckley*, 424 U.S. at 53. The Court has further defined the kind of "corruption" recognized as compelling in *National Conservative Political Action Committee*: "The hallmark of corruption is the financial quid pro quo: dollars for political favors." 470 U.S. at 497.

During the Colorado Party's direct challenge to the constitutionality of the statute below, the government presented no evidence that § 441a(d)(3)'s limits on speech and association are necessary to prevent *quid pro quo* arrangements between political parties and their elected officials. The FEC asserted an anti-corruption rationale, but made no evidentiary demonstration that the limits are in any way tailored to achieve that presumed goal. The court of appeals also did not identify any evidence of party corruption.

The court of appeals sought to overcome the FEC's inadequate corruption showing by ruling (App. 20a-21a) that § 441a(d)(3) serves to "equalize the ability of all citizens to affect the outcome of elections [and to] cap campaign costs and increase accessibility to our political system." The court of appeals mistakenly said (App. 21a) that *Buckley* endorsed these objectives. However, *Buckley* held (424 U.S. at 48-49, 57) and *Meyer v. Grant*, 486 U.S. 414 confirmed at 426, n.7:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .
>
> [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns.

In fact, there is no evidence that modern political parties "corrupt" elected officials by making *quid pro quo* vote-buying arrangements. The limits themselves, which are based on

state populations, refute an "anti-corruption" purpose. For example, a political party in California (or another large state like New York, Florida, Texas, Pennsylvania or Illinois) may spend over $1 million dollars under the § 441a(d)(3) "limit," almost *ten times* more than a Colorado party. *See* FEC 20 *Record* 3 at 5 (Mar. 1994). It is not that Colorado parties are ten times more corrupt than California parties. These limits simply cap spending arbitrarily. Political parties in states larger than Colorado can and do spend over $1 million without the actuality or appearance of corruption. Thus, there is no logical nexus between the limits and the purported governmental interest.

In addition, the legislative history of § 441a(d)(3) reflects no deliberation or evidence on the corruptive effects of political parties. Quite to the contrary, the legislative history reflects a very positive view of political parties and their role in the political process.[8] The only justification reflected in the legislative history for the limitations in § 441a(d)(3) is an arbitrary desire for across-the-board expenditure limits, without regard for the necessity of each limit. Indeed, the sole purpose identified to justify party expenditure limits was to support campaign spending ceilings, and they were subsequently held unconstitutional.[9]

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[8] *See, e.g.*, S. Rep. No. 689, 93d Cong., 2d Sess. 7-8 & 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5593-94 & 5601.

[9] The only reason Congress identified to justify party expenditure limits was the preservation of across-the-board campaign spending ceilings, and the legislative history reflects the concern that unlimited party spending would be a "loophole" in campaign spending ceilings. *See* 120 Cong. Rec. S5411-15 (daily ed. Apr. 8, 1974) (statements of Sens. Clark, Brock, Cannon) (discussions regarding amendment No. 1102, lifting limits on parties, and amendment No. 1152, reimplementing limits on parties).

Buckley v. Valeo subsequently struck campaign spending ceilings and rejected their underlying rationale of effecting a level playing field, but party spending limits remained in effect despite removal of their *raison d'etre*. 424 U.S. at 54. Thus, party expenditure limitations are merely a vestige of an illegitimate rationale — the equalization of political resources.

Second, the Colorado Party is allowed by law to accept contributions only from individuals or political committees (not corporations or unions), and only in amounts less than $5,000 per year.[10] It accepts contributions from diverse sources. It must and does publicly report all such receipts, as well as all of its expenditures. Given these restraints, there is no demonstrable (or even apparent) threat of corruption, and certainly no threat so substantial as to justify an outright limitation on political speech.

Third, the voluntary nature of the Colorado Party *per se* precludes any potential for corruption. The Court has expressly noted that restrictions on independent expenditures are unjustifiable for entities "akin to voluntary political associations." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990), *MCFL*, 479 U.S. at 263. The Colorado Party's candidates voluntarily choose to associate with it and to represent it, and may choose to disassociate from the party at any time. Thus the Colorado Party is not merely "akin" to a voluntary political association; it is one, and it has precisely the "essential features" that *Austin* say exempt even a corporation from limits on expenditures. *Id.* at 662-63.

Fourth, the Colorado Party's candidates seek and obtain nomination on the basis of each candidate's voluntary association with the prevailing party views. Even where there may be policy disagreements between the candidate or elected official and the Colorado Party, the candidate's choice to support the party's position is not evidence of the kind of *quid pro quo* "corruption" described in *Buckley*. In upholding the right of political action committees to make unlimited independent expenditures, the Court has stated that

> [t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to

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[10] The State Party may also receive transfers from other party committees, but those committees also cannot accept corporate funds and otherwise are subject to donation limitations. *See* 2 U.S.C. §§ 441a & 441b.

> political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

National Conservative Political Action Comm., 470 U.S. at 498. This reasoning, which the Court applied to third-party "special interest" groups, logically applies to the broader-based political parties with even stronger force.[11]

Fifth, there is ample evidence that the limitations on the Colorado Party imposed by § 441a(d)(3) actually engender corruption by encouraging candidates to rely disproportionately upon independent expenditures and contributions from a vast number of third-party "special interest" groups, thus tying elected officials more closely to narrow, self-interested groups than to their own broad-based political party.[12] Unshackling political parties would "reduce the candidate's dependence on

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[11] *See Rosario v. Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting) ("Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership.").

[12] *See* Larry J. Sabato, *The Party's Just Begun* at p. 223 (1988) ("The less party money there is available, the more candidates will have to rely on PAC money; the more resources the parties can share with their nominees, the less officeholders will be indebted to special interest groups."); Robert J. Huckshorn & John F. Bibby, *State Parties in an Era of Political Change in The Future of American Political Parties* at p. 91 (Joel L. Fleishman ed. 1982) ("The act imposes expenditure and contribution limits on the support that can be provided by parties to candidates. As a result, congressional and senatorial candidates must rely heavily on nonparty sources for funds."); F. Christopher Arterton, *Political Money and Party Strength in The Future of American Political Parties* at p. 118 (Joel L. Fleishman ed. 1982) ("[T]he most detrimental aspects of the law for political parties come about through the advantages open to institutional competitors.") (collecting data); Frank J. Sorauf & Scott A. Wilson, *Campaigns and Money; A Changing Role for the Political Parties? in The Parties Respond* at p. 191 (L. Sandy Maisel ed. 1990) ("[P]olitical parties'] financial role does not appear very great relative to that of other actors.") (collecting data).

outside contributions and thereby counteract the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."[13] *Buckley*, 424 U.S. at 53 (footnote omitted).

In conclusion, the FEC's assertions below concerning "backdoor" contributions are wholly unsupported by any legislative history or record evidence and are, in fact, untrue. Parties can accept only certain limited donations. Moreover, parties simply do not and by their nature cannot corrupt their own candidates, and thus there is no justification for the restrictions imposed by § 441a(d)(3). At the same time that the court of appeals suggests (App. 20a) that political parties "often are controlled by incumbent officeholders," the Colorado Party is being prosecuted by the government for criticizing an "incumbent officeholder." Section 441a(d)(3) should be declared unconstitutional to permit the Colorado Party, and all political parties, to exercise unfettered First Amendment rights.

II. LIKEWISE, § 441a(d)(3) AS APPLIED TO THE COLORADO PARTY IS UNCONSTITUTIONAL.

On appeal, the Colorado Party contended that applying § 441a(d)(3)'s expenditure limit to "Wirth Facts #1" in the manner the FEC suggested (and the court of appeals adopted) unconstitutionally discriminated based on the content of the Party's speech and that § 441a(d)(3) was impermissibly vague.

Restrictions on First Amendment rights that discriminate based on content are strongly disfavored, unless there is a nexus between the content discrimination and a compelling

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[13] *See* Herbert E. Alexander, *Financing Politics* at p. 172 (4th ed. 1993) ("Strengthening the role of the political parties is one way to offset some of the influence of PACS . . . Currently some candidates may receive hundreds of thousands of dollars in the aggregate from PACs, yet the law prevents parties from competing by providing candidates with similar large amounts."); David E. Price, *Bringing Back the Parties* at p. 260 (1984) ("[Lifting party limits] would give added advantages to parties vis-à-vis PACs and make the parties and candidates less reliant on immoderate direct-mail appeals.").

governmental interest. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue . . . Such power in government to channel the expression of views is unacceptable under the First Amendment.") (citations omitted).

In addition, " '[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity' " and must provide clear notice and guidance to political participants. *Buckley*, 424 U.S. at 41, n.48 (citation omitted). If the government is permitted to do otherwise,

> vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'

Id. (citations omitted).

The court of appeals' deference to the FEC's "interpretation" of § 441a(d)(3) results in content-based censorship. For example, the FEC, without explanation, and by a 3-3 vote, concluded that the Colorado Party may advertise without restriction if the tag lines of its advertisements said

> That's not the way we do things in Colorado. You can't change the facts, Tim []

(App. 105a) but (without explanation and by a 5-1 vote) concluded that the following language was subject to a spending limit:

> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

(App. 93a). Thus, content controls, and there is no connection between such content-based limitation of protected speech and

the FEC's purported governmental interest of preventing corruption. Therefore, § 441a(d)(3), as applied to the Colorado Party, unconstitutionally discriminates based on the content of the Party's speech. *First Nat'l Bank*, 435 U.S. at 784.[14]

Furthermore, the government's standard is so vague that the only sure way to satisfy it is for a political party to avoid criticism of any officeholder who may be considered a candidate. In order to comply with the limits, the Colorado Party and other political parties must evaluate implied as well as express "electioneering messages" and must divine whether a voter or a government official might find a given message sufficient to motivate, in whole or in part, a vote for or against an incumbent officeholder. In addition, parties will have to make prospective assessments of who the likely candidates might be and what opposition might emerge.

The court of appeals did not account for key facts in the record. It failed to note: (1) that the Colorado Party not only aired "Wirth Facts #1" but also aired other radio advertisements and published pamphlets criticizing Congressman Wirth; and (2) that after nearly ten years of litigation, the FEC could not articulate a factual or legal distinction between "Wirth Facts #1" and the other advertisements and pamphlets that the Colorado Party produced and which were dismissed by virtue of an evenly-deadlocked agency.

In essence, the court of appeals leaves the Colorado Party and other state political parties with a "totality of the circumstances" test in which the application of § 441a(d)(3)'s restrictions can never be known in advance without subjective governmental review and approval. Given the above, § 441a(d)(3) as applied here is hopelessly and unconstitutionally vague.

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[14] Moreover, it is unclear whether the court of appeals even considered the Colorado Party's contention that § 441a(d)(3) as applied was an unconstitutional content-based restriction. Only one sentence in the panel's 20-page opinion addressed this issue. *See* App. 21a.

III. IF IT WERE CONSTITUTIONAL, § 441a(d)(3) WOULD RESTRICT ONLY COORDINATED EXPENDITURES FOR EXPRESS ADVOCACY OF THE ELECTION OR DEFEAT OF A CLEARLY IDENTIFIED CANDIDATE IN THE GENERAL ELECTION.

The court of appeals interpreted § 441a(d) so broadly that it has the practical effect of shielding government officeholders and others from critical commentary by the opposing party at any time prior to a federal election, provided they have indicated an intent to run. The effect is particularly acute with respect to members of the House of Representatives, who face election every two years, and who generally are candidates for reelection until and unless they announce for another office or retire.

To reach this unfortunate result, the court of appeals (i) discounted highly pertinent rulings of this Court, including one case construing the very same language in similar and adjacent sections of the same statute, (ii) denied the obvious First Amendment concerns that its construction presents, and (iii) purported to defer to a hazy FEC view it detected in two of three private advisory opinions that, under 2 U.S.C. § 437f, cannot establish a "rule of law." In each of these respects, the court of appeals erred.

A. The Court Of Appeals Should Have Followed This Court's Construction Of Identical Language From The Same Statute.

Section 441a(d)(3) limits expenditures by national and state political parties "in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party." It is one of several similar FECA provisions that have been construed by this Court. All of the other provisions of law have been given the same narrowing construction.

For example, another section of FECA, 2 U.S.C. § 441b, restricts expenditures by national banks, corporations, or labor

organizations "in connection with any election to any [federal] political office." To avoid constitutional issues of vagueness and overbreadth, this Court held that the "in connection with" language applied only to "express advocacy" of the election or defeat of an identified candidate. *MCFL* 479 U.S. at 249.

MCFL adopted its express advocacy standard from the narrowing construction given to several portions of FECA in *Buckley*. For example, former § 608(e)(1) of FECA restricted certain independent expenditures "relative to" a candidate for federal office. *Buckley* interpreted the "relative to" language to encompass only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Similarly, former § 434(e) and (f) of FECA (now § 434(c)(1)) restricted political " 'contributions or expenditures' " made " 'for the purpose of . . . influencing' " the nomination or election of candidates for federal office. *Id.* at 77. Again the Court applied a narrowing construction, holding that this encompassed only contributions or expenditures for express advocacy. 424 U.S. at 74-75.

The court of appeals in this case discounted these rulings. Citing *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934), it pointed out that identical words in a statute may be found in "such dissimilar connections as to warrant the conclusion that they were employed . . . with different intent." To show such "dissimilar connections," the court of appeals reasoned that, since the FEC treats all party spending as coordinated with the party's candidate, the expenditure limit imposed by § 441a(d)(3) really is a contribution limit, and *Buckley* holds that contributions may be regulated more freely than the "expenditures" such as *MCFL* and *Buckley* involved.

This is an extremely weak reed. *Buckley* itself required express advocacy with respect to both "*contributions* and expenditures" regulated by former § 434(e). *Id.* at 74 (emphasis added). Moreover, the language of § 441a(d)(3) expressly limits "expenditures," even if they may have some aspects of a contribution in some cases. The "in connection with" language

of § 441a(d)(3) serves the same descriptive and limiting function as the identical language construed in *MCFL* and the parallel "relative to" language construed in *Buckley*. Also, the language of § 441a(d)(3) presents the same issues of vagueness and overbreadth as the language this Court has interpreted to require express advocacy. These circumstances do not show that § 441a(d)(3) has such a "dissimilar connections" from the other similar provisions of FECA as to suggest a different meaning.

B. The Broader Interpretation Adopted By The Court Of Appeals Raises Serious Constitutional Problems.

The surprising result of the court of appeals' analysis is that political speech by a political party is more highly restricted than political speech by a corporation. Moreover, the restriction strikes at the core function of a political party, limiting its discussion of incumbent office holders from the opposing party. The restriction is not limited to a few months during a general election, but encompasses any period of time during which an officeholder is a candidate under FECA.[15]

These extraordinary restrictions on political speech are not supported by *any* legitimate congressional finding, much less a finding that this Court's precedents would accept as authoritative. Indeed, when the FEC was unable to find any support for an anti-corruption rationale, the court of appeals suggested (App. 20a-21a) that the true purpose of § 441a(d)(3) is "to equalize the ability of all citizens to affect the outcome of elections [and to] cap campaign costs." Historically, the court of appeals probably is right, but such justifications were expressly

[15] Under § 431(2)(A) of FECA, a person is a "candidate" upon raising or spending $5,000. According to a recent FEC press release, the 435 House incumbents raised $45.5 million during the first six months of 1995. *See* Sept. 1, 1995 FEC Press Release at 1. Thus, virtually all current House incumbents are candidates for the 1996 elections.

repudiated in *Buckley*, 424 U.S. at 48-49, 57, and *Meyer*, 486 U.S. at 426 n.7 (1988).

At minimum, therefore, the court of appeals erred in failing to recognize that its expansive interpretation of § 441a(d)(3) raises serious constitutional issues that could be minimized by applying the express advocacy standard developed by this Court.

C. The FEC Advisory Opinions Do Not Justify Disregarding This Court's Rulings.

Having rejected the rulings of this Court, the court of appeals concluded that it "must defer" to the FEC's expansive view of § 441a(d)(3) purportedly reflected in two advisory opinions, FEC Advisory Opinion 1984-15, Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (1984) and FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (1985). In fact, it substantially overread both of those advisory opinions. But beyond that, it committed two more fundamental errors.

First, the panel uncritically assumed that *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), mandates deference to any statement of position by the FEC. In fact, *Chevron* is clear that its delegation of authority to agencies must be consistent with what congress mandated and intended. *Id.* at 844. Here, because Congress was very concerned as to how the FEC might exercise its authority, it inserted into § 437f(b) of FECA the following provision:

> Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

The provisions of § 438(d) referred to require the FEC to give advance notice of any such "rule of law" to Congress in the form of a statement setting out the proposed rule and providing "a detailed explanation and justification." *Id.* This was not done with the advisory opinions on which the court of appeals relied. Moreover, § 437f(c)(1) of FECA provides that advisory opinions should not be extended beyond "any specific transaction or activity which is indistinguishable in all its material aspects." *Id.*

When the FEC acts in other ways, particularly by rulemaking, it may be entitled to *Chevron* deference. This Court has said that the FEC is the type of agency that may merit deference. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). However, the FEC has no authority to establish general principles or rules of law using advisory opinions and thus it was legal error for the panel to rely on those opinions.

Beyond this, the court of appeals expressly noted (fn. 7) that the two opinions it relied upon were inconsistent with an earlier opinion, FEC Advisory Opinion 1978-46, Fed. Election Camp. Fin. Guide (CCH) ¶ 5348 (1978) that "appears more restrictive," that is, requires express advocacy. However, the court of appeals concluded (at n.7) that *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991), compelled it to "give the current view deference if the current construction is reasonable." In fact, the cited portion of *Rust* makes clear that the current view must not only be reasonable in itself, but it also must provide a reasonable explanation for the agency's change in position. *Id. See also Transcanada Pipelines, Ltd. v. FERC*, 24 F.3d 305, 310 (D.C. Cir. 1994); *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1381 (D.C. Cir. 1985). The two opinions to which the court of appeals deferred do not even acknowledge, much less explain, their differences in analysis from the earlier opinion.

CONCLUSION

For the foregoing reasons, the Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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September 21, 1995

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433
93-1434
(D.C. No. 89-N-1159)

FEDERAL ELECTION COMMISSION,
Plaintiff-Counter-Defendant/Appellee/Cross-Appellant,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
DOUGLAS JONES,
Defendants-Counter-Claimants/Appellants/Cross-Appellees.

ORDER
Entered September 6, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LOGAN Circuit Judges and REED*, District Judge.

***The Honorable Edward C. Reed, Jr., Senior United States District Judge, United States District Court for the District of Nevada, sitting by designation.**

This matter comes on for consideration of appellants/cross-appellees Colorado Republican Federal Campaign Committee and Douglas Jones' suggestion for rehearing in banc.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was

transmitted to all of the judges of the court who are in regular active service. The court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied. Judges Baldock, Ebel and Kelly voted to grant rehearing. Judge Lucero is recused.

Entered for the Court

PATRICK FISHER, Clerk

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Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 93-1433
93-1434
(D.C. No. 89-N-1159)

FEDERAL ELECTION COMMISSION,
Plaintiff-Counter-Defendant/Appellee/Cross-Appellant,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, DOUGLAS JONES,
Defendants-Counter-Claimants-Appellants/Cross-Appellees.

ORDER

Filed August 11, 1995

Before HENRY and LOGAN, Circuit Judges, and REED*, District Judge*

*** The Honorable Edward C. Reed, Jr., Senior United States District Judge, United States District Court for the District of Nevada, sitting by designation.**

Within ten days of the date of this order, the Federal Election Commission shall file a response to the petition for rehearing in banc filed by the Colorado Republican Federal Campaign Committee and Douglas Jones.

Entered for the Court
PATRICK FISHER, Clerk

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Deputy Clerk

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 93-1433 &
93-1434

FEDERAL ELECTION COMMISSION,
Plaintiff/Counter-Defendant/
Appellee/Cross-Appellant,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, DOUGLAS JONES,
Defendants/Counter-claimants/
Appellants/Cross-Appellees.

Appeals from the United States District Court for the District of Colorado
(D.C. No. 89-N-1159)

Jan Witold Baran (Thomas W. Kirby, Carol A. Laham and Lee E. Goodman, also of Wiley, Rein & Fielding, Washington, D.C., with him on the briefs) for the Colorado Republican Federal Campaign Committee and Douglas L. Jones.

Richard B. Bader, Associate General Counsel (Lawrence M. Noble, General Counsel, and Rita A. Reimer, Attorney, also of Federal Election Commission, Washington, D.C., with him on the briefs) for the Federal Election Commission.

Before HENRY and LOGAN, Circuit Judges, and REED, District Judge.*

LOGAN, Circuit Judge.

The Federal Election Commission (FEC) appeals from the dismissal on the merits of its underlying suit filed against the Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones (collectively the Committee) alleging violations of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-442. The Committee cross-appeals from the dismissal as moot of its counterclaim challenging the constitutionality of the FECA expenditure limitations. We hold that the Committee expenditures at issue did violate the coordinated expenditure limitation in 2 U.S.C. § 441a(d)(3). We also reach the constitutional issue and hold that § 441a(d)(3) does not violate the Committee's First Amendment rights.

This action stems from the 1986 United States senatorial campaign in Colorado, and pre-election spending by the Committee. In January 1986, then-congressman Timothy E. Wirth had registered with the FEC as a candidate for the Democratic nomination for the U.S. Senate. Several months later, but before either political party had nominated senatorial candidates, the Committee spent $15,000 for a radio advertisement directed at Wirth's announced candidacy ("Wirth Facts #1").[1] This spending prompted the Colorado Democratic Party's administrative complaint with the FEC

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* The Honorable Edward C. Reed, Jr., Senior United States District Judge, United States District Court for the District of Nevada, sitting by designation.

[1] Wirth Facts #1 read:

> Paid for by the Colorado Republican State Central Committee.

(footnote continues)

alleging that it was an "expenditure in connection with" the general election campaign of a candidate for federal office in violation of the spending limits set out in FECA § 441a(d)(3).

The FEC made a probable cause determination that the Committee violated the FECA. When the parties were unable to reach a settlement the FEC filed suit. The FEC alleged that the Committee failed to report the amount spent on the anti-Wirth publicity as an "expenditure in connection with" the general election campaign, in violation of FECA §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f). The Committee counterclaimed, alleging that the FECA was an unconstitutional infringement on its First Amendment rights. In ruling on the parties' cross motions for summary judgment, the district court dismissed the underlying action after finding no FECA violation, and dismissed the counterclaim as mooted by its merits ruling. These appeals followed.

I

We first address whether the district court correctly concluded that the Committee did not violate the FECA. We review de novo a district court's grant of summary judgment using the same legal standards as the district court. *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1237 (10th Cir.), *cert. denied*, 113 S. Ct. 98 (1992).

(footnote continued)

> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

I Jt. App. 95-96.

A

The FECA regulates contributions made to federal candidates and political parties, and expenditures made by persons and political committees. It also imposes recordkeeping and reporting requirements. The Committee acknowledges that it is subject to the FECA as a federally registered committee of the Colorado Republican Party.

The statute limits monetary contributions and expenditures by state and national political party committees as follows:

> (d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office
>
> (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.
>
> (3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
>
> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000.

2 U.S.C. § 441a(d)(1) and (3). A state political party committee may assign to a designated agent (including a national party committee) the right to make the expenditures the state party could have made. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 41-43 (1981) (*DSCC*). Here the Committee expended funds on the anti-Wirth publicity after assigning to the National Republican Senatorial Committee the authority to make all of the expenditures—$103,248—it was allowed under § 441a(d)(3) for the 1986 U.S. Senate election. *See* I Jt. App. 4, 14; II *id.* 473. The Committee did not report the $15,000 anti-Wirth publicity expense under 2 U.S.C. § 434(b)(4)(H)(iv),[2] instead characterizing it as an expense for "Voter Information to Colorado Voters—Advertising." II App. 478, ¶ A. The narrow issue is whether the anti-Wirth publicity expense was an "expenditure in connection with the general election campaign" pursuant to § 441a(d)(3) and should have

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[2] 2 U.S.C. § 434(b)(4)(H)(iv) reads in part:

> (b) Contents of reports
>
> Each report under this section shall disclose—
>
> . . .
>
> (4) for the reporting period and the calendar year, the total amount of all disbursements, and all disbursements in the following categories:
>
> . . .
>
> (H) for any political committee other than an authorized committee—
>
> (i) contributions made to other political committees;
>
> (ii) loans made by the reporting committees;
>
> (iii) independent expenditures;
>
> (iv) expenditures made under section 441a(d) of this title; and
>
> (v) any other disbursements.

been reported accordingly. If so, the Committee exceeded the § 441a(d)(3) monetary ceiling.

As relevant here, the FECA addresses two types of campaign expenditures: independent and coordinated.[3] A coordinated expenditure is one made "in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Buckley v. Valeo*, 424 U.S. 1, 47 n.53 (1976). *See also* 11 C.F.R. § 110.7(b)(4). Because political parties are considered incapable of making independent expenditures, the district court correctly found that the anti-Wirth publicity expense was a coordinated expenditure. *See DSCC*, 454 U.S. at 29 n.1. If that spending was an "expenditure[] in connection with" the campaign it was subject to the monetary limitations at § 441a(d). *Id.* The district court concluded that the Committee's coordinated expenditure on the anti-Wirth publicity was not made in connection with the 1986 Colorado senatorial campaign, and therefore was not subject to the § 441a(d)(3) limits.

B

The FECA does not clearly manifest the meaning Congress intended to attach to the "expenditures in connection with" language in § 441a(d)(3). Acknowledging that there were no controlling or persuasive cases interpreting that section, the district court relied upon *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), and its interpretation of

[3] An independent expenditure is "made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17); *see also* § 441a(a)(7)(A)-(B).

FECA § 441b. Section 441b[4] restricts the contributions and expenditures of national banks, corporations, or labor organizations. The Supreme Court in *MCFL* considered whether Massachusetts Citizens for Life, Inc., a nonprofit, nonstock corporation, by financing a newsletter urging voter support for

[4] 2 U.S.C. § 441b provides in relevant part as follows:

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus, held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept/or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(2) For purposes of this section and section 791(h) of Title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

identified pro-life candidates, violated the "independent spending" limitations in § 441b. *Id.* at 241. Interpreting the term "expenditure in connection with any election" the Court held that the expenditure "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.11." *Id.* at 249.

MCFL relied upon the *Buckley* opinion's interpretation of a limitation on independent expenditures "relative to" a clearly identifiable candidate. To avoid invalidating on vagueness grounds what was then FECA § 608(e)(1), the *Buckley* Court held the term encompassed only "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. The opinion clarified in a footnote that this construction would restrict the application to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* n.52. *MCFL* adopted the same definition, referencing the same footnote, for purposes of § 441b's independent spending limitation. 479 U.S. at 249.

The district court, noting the identity of the "expenditures in connection with" language in § 441b and in § 443a(d)(3), concluded that the anti-Wirth publicity was not express advocacy and therefore not governed by the 441a(d)(3) limitations. The district court relied in part on a common law rule of statutory construction that identical words used in different sections of the same statute generally should be given the same meaning. However, the Supreme Court has also stated that "the presumption readily yields to the controlling force of the circumstance that words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." *Helvering v. Stockholms Enskilde Bank*, 293 U.S. 84, 87 (1934).

Further, we cannot overlook a significant distinction between *Buckley* and *MCFL* and the instant case. The *Buckley*

opinion distinguished between independent expenditures—regulated by then FECA § 608(e)(i)—and coordinated expenditures. The *Buckley* opinion unequivocally stated that controlled or coordinated expenditures are treated as "contributions rather than expenditures" under the FECA.[5] 424 U.S. at 46-47 & n.53. Although *Buckley* found the ceiling on independent expenditures failed to serve substantial enough government interests to be constitutional, it reached the opposite conclusion as to the limitations on expenditures by national or state political parties. *Id.* at 55-59 & n.67 ("Does 18 U.S.C. § 608(f) (1970 ed., Supp. IV) violate [constitutional] rights, in that it limits the expenditures of national or state committees of political parties in connection with general election campaigns for federal office? Answer: NO, as to the Fifth Amendment challenge advanced by appellants."). *Buckley* accepted the FECA's treatment of expenditures by national and state committees of political parties as contributions, as have subsequent opinions of the Supreme Court. *See DSCC*, 454 U.S. 27, 29 n.1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates. The Commission has, by regulation, forbidden such 'independent' expenditures by the national and state party committees."). Similarly, *MCFL* made the same distinction when interpreting the meaning of independent expenditure limits in § 441b. *MCFL*, 479 U.S. at 259-60.

Subsequent amendments to the FECA include "expressly advocating" into the definition of independent expenditures. *See* 2 U.S.C. § 431(17). Coordinated expenditures of political parties, however, are not defined in this manner. *See id.* § 431(9)(B)(ix); *cf. id.* § 431(8)(B)(v), (x), (xii) (what is not a contribution). This is some evidence of congressional intent that the phrases are not intended to have the same meaning.

The distinction between independent expenditures and political party expenditures that are deemed to be contributions,

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[5] Coordinated expenditures are treated as campaign contributions that must be reported pursuant to § 441a(a)(7)(B)(i).

and their different treatment by the Supreme Court, negates the necessity that "expenditures in connection with" be construed identically in different sections of the FECA. However, the meaning of "expenditures in connection with" is not perfectly clear, else the Court in *MCFL* would not have had to cabin its meaning under § 441(b) in the manner it did. The question then becomes whether we must construe the phrase as narrowly as the Supreme Court did in *MCFL* in order to uphold its validity.

C

The FEC has issued advisory opinions interpreting the "expenditures in connection with" phrase in § 441a(d)(3) in a manner different than that adopted by the district court and urged upon us by the Committee. We believe this is an appropriate circumstance in which to follow the Supreme Court's admonishment that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (footnote omitted); *see also DSCC*, 454 U.S. at 37 (the FEC, a bipartisan body, is "precisely the type of agency to which deference should presumptively be afforded").[6]

FEC Advisory Opinion 1984-15 addressed questions raised by the Republican Party regarding spending for a series of television ads denigrating the potential Democratic presidential candidates, relating to an upcoming election. The FEC

[6] We note that one of the reasons the *Buckley* opinion gave for its "express advocacy" restrictive interpretation of 608(e)(1)'s "relative to" language was that most who were subject to the statute's criminal sanctions had no right to obtain an advisory opinion of the FEC. *See* 424 U.S. at 40 n.47. It noted that only candidates, federal office holders and *political committees* had that right. *Id.* Section 441a(d), at issue before us, applies only to political committees; thus all to whom it applies can secure advisory opinions from the FEC.

responded to a specific question whether such spending was within the limitations of § 441a(d).

> These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. *See generally* Advisory Opinion 1978-46. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (May 31, 1984) (footnote omitted). The opinion then concluded that the spending in question was a coordinated expenditure subject to the limitations in § 441a(d)(2).

Advisory Opinion 1985-14 responded to questions from a Democratic Congressional Campaign Committee regarding proposed publicity focusing on a number of congressmen, not all with announced opposition candidates. A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (May 30, 1985). The opinion endorsed Advisory Opinion 1984-15 with its construction of § 441a(d) as regulating expenditures that "both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message."[7]

The FEC has "primary and substantial responsibility for administering and enforcing" the FECA. *Buckley*, 424 U.S. at 109. The FEC argues that its construction of § 441a(d) as regulating political committee expenditures depicting a clearly

[7] Advisory Opinion 1978-46 appears more restrictive; it can be read to adopt the express advocacy position. A.O. 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978). But even if the more recent decisions represent a change in position by the FEC we must still give the current view deference if the current construction is reasonable. *Rust v. Sullivan*, 500 U.S. 176, 186-87 (1991).

identified candidate and conveying an electioneering message is a reasonable one to which we must defer. Viewing the party expenditures as contributions, as we must, we agree.

"[T]he primary interest served by the Act is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *DSCC*, 454 U.S. at 41. The Supreme Court cases have distinguished between the potential for corruption that attaches to contributions and coordinated expenditures, and those that might develop from independent expenditures, finding less inherent risk in the latter. Our analysis, therefore, with respect to controls on coordinated expenditures and contributions under § 441a is different than that required for § 441b.

Section § 441a(d) addresses the concern that large contributors to political parties will exert undue influence on a candidate if elected to office. The monetary ceiling on coordinated expenditures by political organizations diminishes the potential of such undue influence but preserves the important role of political parties. *See DSCC*, 454 U.S. at 41. In contrast, the purpose behind § 441b is to prevent corporate and labor expenditures from effectively acting as "political war chests" on behalf of candidates, because these organizations could use funds "amassed in the economic marketplace . . . (for] unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. The FECA thus provides different regulations tailored to different perceived evils.[8] Independent expenditures are theoretically unlimited but such expenditures in excess of low limits must be reported, along with identification of those who contributed more than $200. Contribution limits still apply. Giving deference to the FEC's interpretation, we hold that § 441a(d)(3) applies to coordinated-spending that involves a clearly identified candidate and an electioneering message,

[8] We have already discussed how subsequent FECA amendments have adopted the "express advocacy" criteria to differentiate between independent and coordinated expenditures.

without regard to whether that message constitutes express advocacy.

D

The Committee does riot seriously contest that the anti-Wirth publicity was directed at a clearly identified candidate. "Wirth Facts #1" referenced Wirth's senatorial aspirations and challenged his personal integrity and campaign statements in the context of the current election.[9] Wirth was not yet the Democratic nominee, but the FECA regulates coordinated expenditures made before the primary election. A.0. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766. The Committee's objective to elect the eventual Republican candidate is not diminished because a Democratic nominee has not emerged. *See Buckley*, 424 U.S. at 79 (major purpose of expenditures by candidates and political committees "is the nomination or election of a candidate").

We next consider whether "Wirth Facts #1" contained an electioneering message.[10] Advisory Opinion 1984-15 examined proposed television advertising by the Republican National Committee that would "question or challenge the candidate's statements, position, or record." The FEC concluded that the

> clear import and purpose of these proposed advertisements is to diminish support for any Democratic Party presidential nominee and to garner support for whoever

[9] *See also* 2 U.S.C. S 431(18) which reads:

> The term "clearly identified" means that—
>
> (A) the name of the candidate involved appears;
>
> (B) a photograph or drawing of the candidate appears; or
>
> (C) the identity of the candidate is apparent by unambiguous reference.

[10] We agree with the district court that the message in "Wirth Facts #1" would not constitute express advocacy within the narrow definition of *Buckley* and *MCFL*. It lacks the express words "vote for" or "vote against," or words of similar import, although it comes close when the ad suggests that an identified candidate distorted his voting record.

> may be the eventual Republican Party nominee. These advertisements relate primarily, if not solely, to the office of President of the United States and seek to influence a voter's choice between the Republican Party presidential candidate and any Democratic Party nominee in such a way as to favor the choice of the Republican candidate . . . . These advertisements effectively advocate the defeat of a clearly identified candidate in connection with that election and thus have the purpose of influencing the outcome of the general election for President of the United States. Therefore, expenditures for these advertisements benefit the eventual Republican presidential candidate and are made with respect to the presidential general election and in connection with the presidential general election campaign.

A.O. 1984-15, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5766 (citation and footnotes omitted). The next year, the FEC relied upon that construction in rendering Advisory Opinion 1985-14 to the Democratic Congressional Campaign Committee stating that "[e]lectioneering messages include statements 'designed to urge the public to elect a certain candidate or party.' " A.O. 1985-14, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5819 (quoting *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957)).

Any reasonable reading of "Wirth Facts #1," which included the notation of Republican Party sponsorship, would leave the reader (or listener) with the impression that the Republican Party sought to "diminish" public support for Wirth and "garner support" for the unnamed Republican nominee. "Wirth Facts #1" unquestionably contained an electioneering message. We conclude that the anti-Wirth publicity was an "expenditure in connection with" the 1986 Colorado senatorial election because it named both a clearly identifiable candidate and contained an electioneering message. The Committee, therefore, violated the FECA by making a § 441a(d)(3) expenditure after delegating to the National

Republican Senatorial Committee the authority to spend all of the Committee's available funding for the 1986 Colorado Senate race.

II

We next consider the Committee's constitutional challenges to the FECA. The Committee asserts that the monetary caps in § 441a(d)(3) violate its First Amendment guarantees of freedom of speech and association. The Committee focuses on the alleged absence of a compelling governmental interest served by the restrictions in § 441a(d)(3) and also asserts that the statute discriminates based upon content. The FEC's position is that *Buckley* and later cases endorse distinctions between independent expenditures and contributions, and that other FECA contribution ceilings have consistently been upheld as constitutional by the Supreme Court. We agree with the FEC that § 441a(d)(3) is a permissible burden on speech and association.

The primary purpose of the contribution and expenditure caps in the FECA are to prevent corruption or the appearance of corruption. *Buckley* 424 U.S. at 25-26. The FECA starts from the premise that political committees may make only minimal expenditures in connection with campaigns, § 441a(a) (dollar limits on contributions), then creates one exception at § 441a(d)(3) (coordinated expenditure limits for certain political committees made in connection with federal election campaigns). *DSCC*, 454 U.S. at 28-29 n.1; 11 C.F.R. § 110.7(b); *see also* 2 U.S.C. § 431(14)-(16). This exception allows for greater monetary support by political parties than would otherwise be permitted by § 441a(a). The coordinated expenditures permitted by § 441a(d)(3) are treated for purposes of reporting and monetary limitations as contributions from the political committee to the candidate, § 441a(7)(B)(i); *see also* § 434(b)(4)(H)(iv), and fall within the contribution ceilings contained in § 4.41a(a). *See Buckley*, 424 U.S. at 46; *FEC v.*

National Political Action Committee, 470 U.S. 480, 492 (1985) *(NCPAC)*.

The same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees.[11] The opportunity for abuse is greater when the contributions (or in the instant case, coordinated expenditures) derive from sources inherently aligned with the candidate, rather than with independent expenditures. *See Buckley*, 424 U.S. at 26-27; *NCPAC*, 470 U.S. at 497. The Committee, stressing the benefits of party discipline and the broad interests of party success, argues that the dangers of domination of candidates by large individual donors do not apply to party expenditures. But party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures. The members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties. This case is, therefore, ideally postured for deference to the congressional will.

The Supreme Court has endorsed the government's interest in curtailing large campaign contributions as legitimate. In

[11] We acknowledge that *Buckley* upheld then 18 U.S.C. § 608(f) as constitutional when challenged as discriminatory under the Fifth Amendment, and not the First Amendment, which is the basis for the Committee's constitutional challenge here. *Buckley*, 424 U.S. at 59 n.67. However, *MCFL* adopted much of the reasoning in *Buckley* in analyzing the First Amendment challenges to § 441b. We do not, therefore, discount the importance of *Buckley* in the context of our First Amendment analysis.

addition to preventing corruption or the appearance of corruption, these restrictions "equalize the relative ability of all citizens to affect the outcome of elections," *Buckley*, 424 U.S. at 26, and to a degree cap campaign costs and increase accessibility to our political system. *Id.* The Court has distinguished between restrictions on contributions and restrictions on independent expenditures and then invalidated spending restrictions while upholding contribution limits. *Id.* at 58-59.

By treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, "secur[ing] a political *quid pro quo* from current and potential office holders." *Id.* at 26-27. Contribution limits regulate the quantity of political speech, but do not foreclose speech or political association. We do not see this monetary cap as content based; it is rather a consequence of the funding source. We uphold as constitutional, against the Committee's First Amendment challenge, the spending limits in § 441a(d)(3).

We REVERSE and REMAND with instructions that the district court enter judgment in favor of the FEC, and for a determination under 2 U.S.C. § 437g(a)(6) of the appropriate civil penalty.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 89 N 1159

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, et al.,

Defendants.

ORDER AND MEMORANDUM OF DECISION

This case involves alleged violations of the Federal Elections Campaign Act of 1971, as amended, 2 U.S.C.A. §§ 431-456 (West 1985) (the "Act"). Plaintiff Federal Election Commission sued Defendant Colorado Republican Federal Campaign Committee and its treasurer, Douglas L. Jones, claiming that defendants had failed to report a certain payment as an "expenditure," as required by 2 U.S.C.A. § 441a(d)(3). Plaintiff seeks declaratory, civil, and injunctive relief under the Act. The matter comes before the court on (1) "Defendants' Motion for Summary Judgment" filed May 15, 1990, and (2) "Plaintiffs Motion for Summary Judgment" filed July 6, 1990. Jurisdiction is based on 28 U.S.C.A. § 1345 (West 1976).

FACTS

Defendant Colorado Republican Federal Campaign Committee (the "Committee") is an unincorporated political association. It works to advance the goals and values of the Republican Party in the State of Colorado. (Defs.' Statement of

Undisputed Facts and Supp. Exs. ¶ 1 [filed May 15, 1990] [hereinafter "Defs.' Statement"], *admitted at* Pl. Fed. Election Comm'n's Resp. to Defs.' Statement of Undisputed Facts and Supp. Exs. ¶ 1 [filed July 6, 1990] [hereinafter "Pl.'s Resp. to Defs.' Statement"].) It is the federally-registered committee for the Republican Party in Colorado and is therefore (as it acknowledges) subject to the Act.

Section 441a(d)(3) of the Act limits the amount which such a committee may expend "in connection with the general election campaign of a candidate for federal office." 2 U.S.C.A. § 441a(d)(3). In 1986, the Committee assigned its yearly right to make expenditures under the Act to the National Republican Senatorial Committee. (Defs.' Statement ¶ 16, Ex. 4 [Defs' Resp. to Pl.'s Req. for Admis.], *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 15-16.) The Committee thereafter paid $15,000 for a radio advertisement, entitled "Wirth Facts #1" [hereinafter "the Advertisement"], the text of which follows:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

(Defs.' Statement ¶ 7, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee devised "Wirth Facts #1" as a response to a series of television advertisements featuring then-Congressman Wirth. These advertisements were sponsored by the Committee for Tim Wirth, Inc. (Pl. Fed. Election Comm'n's Mem. of

P. & A. in Supp. of Pl.'s Mot. for Summ. J. and in Opp'n to Defs.' Summ. J. Mot. at 6 [filed July 6, 1990] [hereinafter "Pl.'s Mot."].) The Advertisement ran between April 4 and 13, 1986, four months before the August Democratic primary and seven months before the November general election. (Defs.' Statement ¶¶ 4-6, *admitted at* Pl.'s Resp. to Defs.' Statement ¶¶ 4-7.)

The Committee is required by section 434(b)(4)(H)(iv) to make quarterly or monthly reports which must contain any section 441(b)(3) expenditures. *See* 2 U.S.C.A. § 434(a)(4)(A)(i). In the Committee's quarterly report, it listed the $15,000 paid for the Advertisement as an operating expense—not as a section 441a(d)(3) expenditure—and identified it as "voter information to Colorado voters—advertising." (Defs.' Statement, Ex. 12 at 3 [Defs.' Br. for Fed. Election Comm'n Proceedings].) On June 12, 1986, the Colorado Democratic Party filed an administrative complaint with the Federal Election Commission ("Commission"), alleging, inter alia, that defendants' expenditure for the Advertisement violated the Act. On January 10, 1989, the Commission determined there was probable cause to believe defendants had violated sections 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f) of the Act. When settlement negotiations failed, the Commission instituted this civil action.

The parties filed cross-motions for summary judgment on plaintiff's claim that defendants failed to comply with the Act. Defendants maintain section 441a(d)(3) does not apply to the money paid for the Advertisement because it was not an expenditure "in connection with" the general election of a candidate for federal office. (Defs.' Mem. in Supp. of Defs.' Mot. for Summ. J. at 6-7 [filed May 15, 1990] [hereinafter "Defs.' Mot."].) Defendants also assert a counterclaim alleging that section 441a(d)(3) is unconstitutional. No material facts are in dispute. Because I find that plaintiff has failed to demonstrate the Advertisement was "in connection with" the general election of a candidate for federal office, I grant defendants' motion

for summary judgment and deny plaintiffs motion. I therefore need not, and do not, reach defendants' challenge to section 441a(d)(3)'s constitutionality.

ANALYSIS

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted where there is "no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S. Ct. 2548, 2552 (1986). In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Id.*, 477 U.S. at 321, 106 S. Ct. at 2552. Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. A triable issue of material fact exists only where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990). If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson*, 477 U.S. at 250, 106 S. Ct. 2511.

Section 441a(d)(3)of the Act is at the center of this dispute. It provides:

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure *in connection with the general election campaign of a candidate for Federal office* in

a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator . . . , the greater of—

(i) 2 cents multiplied by the voting age population of the State . . . ; or

(ii) $20,000 . . .

2 U.S.C.A. § 441a(d)(3) (emphasis added). Because the Committee assigned the full amount of expenditures permitted by section 441a(d)(3) to the National Republican Senatorial Committee, *see Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39-40, 102 S. Ct. 38, 46 (1981) [hereinafter *DSCC*], it no longer had the right to make section 441a(d)(3) expenditures. As a consequence, the Committee's expenditure of $15,000 for the Advertisement, if made "in connection with" the general election campaign, was a violation of the spending limits established by section 441a(d)(3).

Two types of expenditures are regulated under the Act: coordinated and independent. A coordinated expenditure is one made in cooperation with, or with the consent of, a candidate, his agents, or an authorized committee of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 47 n.53, 96 S. Ct. 612, 647 n.53 (1976). An independent expenditure is one made without the knowledge or permission of a candidate, his agent, or his campaign committee. *Id. See* 2 U.S.C.A. § 431(17). Coordinated expenditures are considered "contributions" under section 441a(a)(7)(B)(i); as such, they may be more freely limited than independent expenditures. *Buckley*, 424 U.S. at 48, 96 S. Ct. at 647-48; *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 105 S. Ct. 1459, 1466 (1985) [hereinafter *NCPAC*]. In *Buckley*, the Court upheld as constitutional the limitations on contributions to candidates and struck down as unconstitutional limitations on independent expenditures. *NCPAC*, 470 U.S. at 491, 105 S. Ct.

at 1465. *See also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260, 107 S. Ct. 616, 630 (1986) [hereinafter *MCFL*] ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 194, 196-97, 101 S. Ct. 2712, 2720, 2724-25 (1981) (same).

Expenditures by party committees are considered to be coordinated expenditures subject to the monetary limits of section 441a(d). *DSCC*, 454 U.S. at 27 n.1, 102 S. Ct. at 40 n.1.[1] Party committees have been deemed incapable of making independent expenditures in connection with the campaigns of their party's candidates. *DSCC*, 454 U.S. at 27 n.1, 102 S. Ct. at 40 n.1. *See also* FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985); FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984).

The Commission has the "primary and substantial responsibility for administering and enforcing the Act," and has "extensive rulemaking and adjudicative powers." Buckley, 424 U.S. at 109-10, 96 S. Ct. at 677-78. When interpreting the Act, the Commission's interpretation is presumptively entitled to deference. *DSCC*, 454 U.S. at 38, 102 S. Ct. at 45. The Commission has, by regulation, forbidden independent expenditures by national and state party committees. *See* 11 C.F.R. § 110.7(B)(4) (1981).

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[1] Defendants point to a passage in *Buckley* which classifies 2 U.S.C.A. § 608(f) (West 1970) (recodified as section 441a[d]) as an "expenditure ceiling," as opposed to a contribution limitation. According to defendants, this reference suggests the Court considered section 441a(d) to regulate independent expenditures. It is unclear how referring to section 441a(d) as an "expenditure" limitation necessarily suggests the section regulates *independent* expenditures. In light of the Court and Commission's other pronouncements, and the fact that this reference is dicta, *see Buckley*, 424 U.S. at 58 n.66-67, 96 S. Ct. at 653 n.66-67, I do not find this singular reference persuasive.

Defendants suggest that because no Republican candidate had been nominated, the expenditure was necessarily "independent," not "coordinated." However, for purposes of determining whether an expenditure is coordinated or independent it is irrelevant whether a candidate has been nominated at the time the expenditure is made. *See* FEC Advisory Opinion 1984-15, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5766 (Aug. 16, 1984). "[N]othing in the Act, its legislative history, Commission regulations, or court decisions indicates that coordinated party expenditures must be restricted to the time period between nomination and the general election." *Id.* Organizations whose major purpose is the nomination or election of a candidate "are, by definition, campaign related," *Buckley*, 424 U.S. at 80, 96 S. Ct. at 663, regardless of whether a specific candidate has been nominated. Based on Supreme Court precedent and the Commission's interpretation of the statute, I find that the Committee's expenditure was coordinated. It was made on behalf of the Republican candidate, whomever that might be; and it is irrelevant that no particular person had been designated.

The Committee's expenditure would nevertheless not be subject to section 441a(d)(3) limitations unless the expenditure was made "in connection with" the general election campaign of a candidate for federal office. No controlling or persuasive authority has interpreted the phrase "in connection with" in the context of section 441a(d)(3). The Court, however, has interpreted the phrase "in connection with" in the context of section 441b, which, like section 441a(d)(3), regulates contributions and expenditures. In *MCFL*, the Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249, 107 S. Ct. at 623. *See also Buckley*, 4:.4 U.S. at 80, 96 S. Ct. at 663. "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S. Ct. 2499, 2504 (1990); *Sorenson v. Secretary of Treasury of the United States*, 475 U.S. 851, 860,

106 S. Ct. 1600, 1606 (1986):; *Bamson v. United States*, 81,6 F.2d 549 (10th Cir.), cert. denied, 484 U.S. 896, 108 S. Ct. 229 (1987) (when the same words are used in different sections of the same law, they will be given the same meaning).

This rule of statutory construction is usually followed where different parts of the same act have a similar purpose, as do sections 441a(d)(3) and 441b. Both sections 441a(d)(3) and 441b are intended to regulate contributions and expenditures of multi-person organizations. While section 441a(d) regulates expenditures by national committees, state committees, or subordinate committees of the state committees, section 441b regulates expenditures by national banks, corporations, or labor organizations. Since I examine the statute as a whole, I find the Court's interpretation of "in connection with" in the context of section 441b to be persuasive of my interpretation of the same words in section 441a(d)(3).

Plaintiff urges the court to adopt the Commission's interpretation of "in connection with" which would require the Advertisement to contain a "clearly identified candidate" and an "electioneering message." FEC Advisory Opinion 1985-14, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5819 (July 18, 1985). According to plaintiff, section 441b differs significantly from section 441a(d)(3), in that 441b regulates independent expenditures, whereas section 441a(d)(3) regulates coordinated expenditures. Although Buckley acknowledges that coordinated expenditures may be more freely regulated than independent expenditures, it does not follow that the identical words, when used with reference to coordinated expenditures, should be given a more expansive interpretation.

The Supreme Court's decision in *Buckley* suggests just the opposite. When examining the intrusiveness of the statute's regulations on first amendment freedoms, the Court found that a limitation on coordinated expenditures was justified in order to stem "the reality or appearance of corruption in the electoral process." *Buckley*, 424 U.S. at 46, 96 S. Ct. at 647-48.

Although the Court found the justification for regulating coordinated expenditures outweighed the infringement on the First Amendment, this conclusion does not create a carte blanc for expansive regulation of coordinated expenditures. On the contrary, the fact that section 441a(d)(3) implicates first amendment freedoms argues for adoption of the more narrowly defined "express advocacy" interpretation in order to minimize intrusions.[2] Moreover, as *Buckley* notes, the limitation on contributions by state: political committees, "[r]ather than undermining freedom of association, . . . enhances the opportunity of bona fide groups to participate in the election process." *Buckley*, 424 U.S. at 33, 96 S. Ct. at 642. Given that the effect of the regulation is to enhance the political freedom of committees, I find that the "express advocacy" standard, which is a less intrusive limitation on a committee's freedom, is consistent with the Act's purpose. I do not find any compelling justification within the Commission's advisory opinion, nor in plaintiff's argument, for expanding *Buckley*'s carefully circumscribed exception to its prohibition against regulation of freedom of speech.

The Commission does not point to any other section of the statute where the courts have given the language "in connection with" the expansive interpretation the Commission advocates in this case. In fact, the courts have consistently interpreted "in connection with" as requiring "express advocacy." *See Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 864 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S. Ct. 151

[2] A narrow interpretation of the words "in connection with" also addresses the constitutional concerns raised by defendants. Defendants contend that if all expenditures by state committees were deemed contributions subject to section 441a(d)(3), then they would not be free to speak in favor of their candidates. (Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ. J. and in Reply to Pl.'s Opp'n to Defs.' Mot. for Summ. J. at 4 [filed July 25, 1990] [hereinafter "Defs.' Reply"].) By adopting a more narrowly defined interpretation of "in connection with," state political committees remain free to engage in speech which does not expressly advocate the election of its candidates.

(1987); *Federal Election Comm'n v. Central Long Island Tax Reform*, 616 F.2d 45, 53 (2nd Cir. 1980).[3] In *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986), the Commission itself advocated the adoption of the "express advocacy" interpretation of "in connection with" in the context of section 441b(a). In adopting the Commission's interpretation, the D.C. Circuit noted:

> [T]he FEC's interpretation is consistent with *Buckley*, in which the Supreme Court held that under the first amendment, the phrases "for the purposes of influencing any election" and "in connection with any election" must be defined as the "express advoca[cy] [of] the election or defeat of a clearly-identifiable candidate," a definition that was subsequently incorporated into the Act. *See* 2 U.S.C. § 431(17). To be sure, the Court limited these definitions to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions, *see Buckley*, 424 U.S. at 78-80, 96 S. Ct. at 663-64. Nonetheless the fact that the Court in *Buckley* formulated these definitions for this statutory language demonstrates that the FEC's similar interpretation of the same language is logical,

[3] In *United States v. International Union UAW-CIO*, 352 U.S. 567, 587, 77 S. Ct. 529, 550 (1957), the Court interpreted "in connection with" in the context of a predecessor to the current Act, which prohibited corporate or union contributions or expenditures to be used "in connection with" any election for federal office. *Id.*, 352 U.S. at 568, 77 S. Ct. at 530. The Court held that the "in connection with" found in the statute was understood to proscribe "the expenditure of union dues to pay for commercial broadcasts that are designed to urge the public to elect a certain candidate or party." *Id.*, 352 U.S. at 587, 77 S. Ct. at 550. It is unclear from this language whether the Court was adopting a different interpretation of "in connection with" or merely applying the "express advocacy" standard. Plaintiff does not explain how this language differs materially from the "express advocacy" standard. Since no court has subsequently adopted the language used in *International Union UAW-CIO*, I decline to do so in this case.

> reasonable, and consistent with the overall statutory framework. *The fact that the FEC adopted this interpretation for all relevant statutory provisions, even where not constitutionally required, only adds to its reasonableness for it enhances the consistency and evenhandedness with which the FEC ultimately administers the Act.*

Orloski, 795 F.2d at 166-67 (emphasis added). *See also* FEC Advisory Opinion 1978-46, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 5348 (Oct. 5, 1978) (suggesting that section 441a(d) requires "express advocacy").

The "thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling." *NCPAC*, 454 U.S. at 35, 102 S. Ct. at 44; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5, 98 S. Ct. 566, 573 n.5 (1978). I do not find the Commission's suggested interpretation of "in connection with" to be entitled to deference where it is neither thorough nor consistent with either its own previous rulings or the courts' holdings. I conclude that "express advocacy" is required in order for a coordinated expenditure to be "in connection with" the general election campaign of a candidate for federal office under section 44la(d)(3).

Having made this determination, I must decide whether the Advertisement constituted "express advocacy." The Court has adopted a bright-line test for identifying speech which constitutes "express advocacy," recognizing that:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42, 96 S. Ct. at 645. *See Furgatch*, 807 F.2d at 860; *Federal Election Comm'n v. National Organization for Women*, 713 F. Supp. 428, 432 (D.D.C. 1989). The Court defined "express advocacy" as "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' or 'reject.' " *Buckley*, 424 U.S. at 46 n-52, 96 S. Ct. at 647 n-52. Speech is "advocacy" if it "presents a clear plea for specific action, and . . . it must be clear what action is advocated." *Furgatch*, 807 F.2d at 864. Speech which is merely informative would not be considered "advocacy." *Id.* When determining whether speech constitutes "express advocacy," the focus is on the actual wording used. *Buckley*, 424 U.S. at 42, 96 S. Ct. at 646.

The Advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action. The Advertisement concludes with "Tim Wirth has the right to run for the Senate, but he doesn't have the right to change the facts." Even assuming the Advertisement indirectly discourages voters from supporting Wirth, it does not contain the direct plea for specific action required by *Buckley* and *Furgatch*.

According to plaintiff, the surrounding circumstances suggest the Advertisement was, in fact, a plea for action. The Advertisement identified Wirth by name and position, referred to his senate candidacy, responded to Wirth's own campaign advertisements, and said "paid for by the Colorado Republican State Central Committee." (Pl.'s Mot. at 15.) At the time the Advertisement ran, plaintiff maintains, Wirth was the only credible announced Democratic candidate for Senate. *Id.* In addition, the public "knew" the sponsor of the Advertisement, *i.e.*, the Republican party, would eventually nominate a candidate. Thus, the Advertisement implicitly urged the public both to vote against Wirth and to support whomever the Republican candidate would be. Plaintiff also points to contemporaneous press statements of Howard "Bo" Callaway, then Chairman of the

Colorado Republican Party, concerning the state committee's general purpose which allegedly leave "no doubt that the intent of the ad was to attack Mr. Wirth's candidacy for the Senate." (Pl.'s Mot. at 10-11, 17-18.)

I do not believe this type of indirect urging constitutes "express advocacy" under the *Buckley* analysis. *Buckley* adopted a bright-line test that expenditures must "in express terms advocate the election or defeat of a candidate" in order to be subject to limitation. *Faucher v. Federal Election Comm'n*, 928 F.2d 468, 471 (1st Cir. 1991). In adopting a bright-line approach, the Court noted the difficulty in interpreting the meaning and effects of words:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43, 96 S. Ct. at 646 (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S. Ct. 315, 325 [1945]). In adopting the "express advocacy" standard, the Court sought to protect issue advocacy. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential. . . . Discussion of public issues and debate on the: qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14-15, 96 S.

Ct. at 632. Trying to determine whether the surrounding circumstances, coupled with the implications of the Advertisement, constitute "express advocacy" leads to the type of semantic dilemma which the Court sought to avoid by adopting a bright-line rule. I decline to blur *Buckley*'s bright-line rule by interpreting the Advertisement's criticism of Wirth as "express advocacy." Viewing the facts in the light most favorable to plaintiff, I find that the Advertisement does not call for the type of "express advocacy" required by *Buckley*. Because I conclude that no reasonable trier of fact could find for plaintiff on the basis of the evidence presented, defendants are entitled to summary judgment as a matter of law. *Masushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

With regard to plaintiff's motion for summary judgment, the analysis of whether the Advertisement constitutes "express advocacy" is the same. Defendants allege that the Advertisement neither contains a direct plea for action, nor conveys support for a particular candidate. According to defendants, the Advertisement simply informed the public about the political record of an incumbent Colorado congressman; it did not advocate voting for or against any political candidate. (Defs.' Mot. at 7.) In addition, the Advertisement was broadcast seven months before the general election—before either party had chosen its candidate. (Defs.' Reply at 10.) Defendants claim Wirth's senate candidacy was referenced in the Advertisement only for the purpose of identifying his statements. (Defs.' Reply at 9.) Plaintiff fails to adequately rebut these claims. Accordingly, plaintiffs motion for summary judgment is denied.

Conclusion

Because I find that the expenditure for the Advertisement was not "in connection with" the general election of a candidate for federal office, it was not subject to section 44la(d)(3) limitations and did not violate the Act. Since I am able to resolve the dispute on statutory grounds, I do not reach defendants'

challenge to the constitutionality of section 44la(d)(3). Defendants cannot avoid this result by posturing the constitutional issue as an independent counterclaim. It is therefore

ORDERED as follows:

(1) Plaintiffs motion for summary judgment is DENIED; and

(2) Defendants' motion for summary judgment is GRANTED. All claims against defendants are dismissed. Defendants' counterclaim is DISMISSED as moot.

Dated this 30th day of August, 1993.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89 N 1159

CERTIFICATE OF MAILING

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on August 30, 1993, was mailed to the following on August 30, 1993:

Kenneth E. Kellner, Esq.
Lawrence M. Noble, Esq.
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JAMES R. MANSPEAKER,
CLERK

By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 89-N-1159

FEDERAL ELECTION COMMISSION,
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200,

Plaintiff,

v.

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE,
1275 Tremont Place
Denver, Colorado 80204
(303) 893-1776,

and

DOUGLAS L. JONES, AS TREASURER,
1275 Tremont Place
Denver, Colorado 80204
(303) 893-1776,

Defendants.

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER APPROPRIATE RELIEF

JURISDICTION

1. This action seeks declaratory, injunctive and other appropriate relief pursuant to the express authority granted the Federal Election Commission ("Commission" or "FEC") by provisions of the Federal Election Campaign Act of 1971, as amended ("Act") or "FECA"), codified at 2 U.S.C.

§§ 437d(a)(6) and 437g(a)(6)(A). This court has original jurisdiction over this suit pursuant to 28 U.S.C. § 1345 as an action brought by an agency of the United States expressly authorized to sue by an act of Congress.

VENUE

2. Venue is properly found in the District of Colorado, in accord with 2 U.S.C. § 437g(a)(6)(A), as the defendants can be found, reside or transact business in this district.

THE PARTIES

3. Plaintiff Federal Election Commission is the agency of the United States government empowered with exclusive and primary jurisdiction with respect to the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a) and 437g. The FEC is authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1) and (2), and has exclusive jurisdiction to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act. 2 U.S.C. §§ 437c(b)(1) and 437g(a)(6).

4. Defendant Colorado Republican Federal Campaign Committee ("State Party") is a political committee within the meaning of 2 U.S.C. § 431(4) and is the federal account of the Colorado Republican State Central Committee. *See* 11 C.F.R. § 102.5(b)(1)(i). Hence the State Party is a party committee which represents a political party on the state level. *See* 11 C.F.R. § 100.5(e)(4).

5. Defendant Douglas L. Jones is the treasurer of the Colorado Republican Federal Campaign Committee. *See* 2 U.S.C. §§ 432(a), 432(c), and 434(a)(1).

STATUTES

6. 2 U.S.C. § 441a(d)(3)(A) states, *inter alia*, that a State committee of a political party may not make any expenditure in connection with the general election campaign of a candidate

for the United States Senate in that State who is affiliated with such party which exceeds the greater of 2 cents multiplied by the voting age population of the State or $20,000.

7. 2 U.S.C. § 434(b)(4)(H)(iv) states that political committees must report to the Commission, for the reporting period and the calendar year, the total amount of expenditures made under 2 U.S.C. § 441a(d).

8. 2 U.S.C. § 434(b)(6)(B)(iv) states that political committees (other than the authorized committees of candidates) must report to the Commission the name and address of each person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of any such expenditure as well as the name of, and the office sought by, the candidate on whose behalf the expenditure is made.

9. 2 U.S.C. § 441a(f) states, *inter alia*, that no political committee shall knowingly make any expenditure in violation of 2 U.S.C. § 441a, and no officer or employee of a political committee shall knowingly make any expenditure on behalf of a candidate in violation of any limitation imposed on contributions and expenditures under 2 U.S.C. § 441a.

ADMINISTRATIVE PROCEEDINGS

10. On June 12, 1986, M. Buie Seawell filed an administrative complaint on behalf of the Colorado State Democratic Party against the State Party and its treasurer. On June 19, 1986, the Commission notified the State party and its treasurer that a complaint had been field against them. Acting upon the basis of information ascertained from the complaint and the response made thereto, the Commission, by the affirmative vote of at least four of its members, found reason to believe on November 5, 1986, that the State Party and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). The basis of this finding was that it appeared that the State Party

and its treasurer had made a disbursement for a radio advertisement that appeared to be an expenditure in connection with the general election for United States Senator from Colorado in 1986, and thus said expenditure appeared to be subject to the limitations of 2 U.S.C. § 441a(d)(3)(A); the State Party and its treasurer, however, had not reported these expenditures in accordance with 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). An investigation was initiated.

11. By letter dated November 13, 1986, the State Party and its treasurer were notified of the Commission's reason to believe findings of November 5, 1986.

12. The Commission's General Counsel notified the State Party and its treasurer by letter dated November 10, 1987, that the General Counsel was prepared to recommend that the Commission find probable cause to believe that they had violated the Act, and provided them with a brief stating the position of the General Counsel on the legal and factual issues of the case. *See* 2 U.S.C. § 437g(a)(3). The State Party and its treasurer were provided an opportunity to respond.

13. On June 14, 1988, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that the State Party and its Treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

14. By letter dated June 23, 1988, the State Party and its treasurer were notified of the Commission's probable cause to believe findings of June 14, 1988, and a proposed conciliation agreement directed to the State Party and its treasurer was enclosed.

15. The Commission's General Counsel notified Douglas L. Jones by letter dated September 28, 1988, that the General Counsel was prepared to recommend that the Commission find probable cause to believe that Douglas L. Jones, as treasurer of the State Party, had violated the Act, and provided him with a brief stating the position of the General Counsel in the legal and

factual issues of the case. *See* 2 U.S.C. § 437g(a)(3). Douglas L. Jones, as treasurer, was provided an opportunity to respond.

16. On January 10, 1989, the Commission, by the affirmative vote of at least four of its members, found probable cause to believe that Douglas L. Jones, as treasurer of the State Party, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

17. By letter dated January 17, 1989, the State Party and Douglas L. Jones, as treasurer, were notified of the Commission's probable cause to believe findings of January 10, 1989, and a proposed conciliation agreement directed to the State Party and Douglas L. Jones, as treasurer, was enclosed.

18. The Commission endeavored for a period of not less than thirty (30) days to correct the violation by informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with the defendants in accordance with 2 U.S.C. § 437g(a)(4)(A).

19. On April 7, 1989, after failing to reach an agreement with the State Party and Douglas L. Jones, as treasurer, the Commission, by the affirmative vote of at least four of its members, authorized, pursuant to 2 U.S.C. § 437g(a)(6)(A), the filing of a civil suit against the defendants in the United States District Court.

20. Thereafter, the defendants were notified by letter dated April 10, 1989, of the Commission's authorization of the instant civil action.

21. The Commission has met all of the jurisdictional prerequisites for filing this suit.

STATEMENT OF CLAIM

COUNT 1

22. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 21, inclusive.

23. Defendants were prohibited by 2 U.S.C. § 441a(d)(3)(A), from making expenditures in connection with the 1986 general election campaign of a candidate for United States Senator from Colorado in excess of an amount equal to 2 cents multiplied by the voting age population of the State, which amount was $103,248.

24. Defendants assigned their right to make expenditures pursuant to 2 U.S.C. § 441a(d)(3)(A) in connection with the 1986 general election campaign for United States Senator from Colorado to the National Republican Senatorial Committee.

25. On April 2, 1986, defendants made an expenditure of $15,000 to pay for a radio advertisement, known as "Wirth Facts 1." The text of this advertisement was as follows:

> "Paid for by the Colorado Republican State Central Committee.
>
> "Here in Colorado we're use [sic] to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."

26. "Wirth Facts #1" was aired during the period between April 2, 1986 and August 12, 1986. During that period, Tim Wirth was a member of the United States House of Representatives and a Democratic candidate for the United States Senate. He had no opposition for the Democratic party nomination for the United States Senate in the primary held August 12, 1986. In that primary, he was nominated by the Democratic party for

the office of United States Senator, and ran in the general election as the opponent of the Republican party candidate for United States Senator.

27. Defendants' expenditure of $15,000 to pay for the radio advertisement known as "Wirth Facts #1" was made in connection with the 1986 general election for the United States Senate in Colorado.

28. Defendants' expenditures of $15,000 to pay for "Wirth Facts #1" was an expenditure made by the State committee of a political party that was subject to 2 U.S.C. § 441a(d).

29. Defendants did not report to the Commission their expenditure of $15,000 pursuant to 2 U.S.C. § 441a(d) as required by 2 U.S.C. § 434(b)(4)(H)(iv).

30. Defendants' failure to report to the Commission their expenditure of $15,000 pursuant to 2 U.S.C. § 441a(d) violated 2 U.S.C. § 434(b)(4)(H)(iv).

COUNT 2

31. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 21, and 23 through 28, inclusive.

32. Defendants were required by 2 U.S.C. § 434(b)(6)(B)(iv) to report to the Commission the name and address of each person who received any expenditure from the State Party during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made.

33. Defendants did not report to the Commission, with respect to their expenditure for "Wirth Facts #1," the name and address of each person who received said expenditure from

the State Party, the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made.

34. Defendants' failure to report to the Commission the name and address of each person who received any expenditure from the State Party during the reporting period in connection with an expenditure under 2 U.S.C. § 441a(d), together with the date, amount, and purpose of such expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure was made, violated 2 U.S.C. § 434(b)(6)(B)(iv).

COUNT 3

35. Plaintiff incorporates herein by reference the allegations contained in paragraphs 1 through 21, and 23 through 28, inclusive.

36. Defendants' expenditure of $15,000 in connection with the 1986 general election for U.S. Senator from Colorado pursuant to 2 U.S.C. § 441a(d) was in excess of the limitation on the amount of such contributions set forth at 2 U.S.C. § 441a(d)(3)(A)(i), in that defendants had assigned their right to make expenditures pursuant to 2 U.S.C. § 441a(d)(3)(A) in connection with the 1986 general election campaign for United States Senator from Colorado to the National Republican Senatorial Committee, and therefore defendants could not longer make such expenditures.

37. Defendants violated 2 U.S.C. § 441a(f) by making an expenditure in excess of the limitation set forth at 2 U.S.C. § 441a(d)(3)(A)(i).

PRAYER FOR RELIEF

WHEREFORE, the plaintiff Federal Election Commission prays that this Court:

(1) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as

treasurer, violated 2 U.S.C. § 434(b)(4)(H)(iv) by failing to report an expenditure made pursuant to 2 U.S.C. § 441a(d).

(2) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 434(b)(6)(B)(iv) by failing to report an expenditure made pursuant to 2 U.S.C. § 441a(d).

(3) Declare that defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, violated 2 U.S.C. § 441a(f) by making an expenditure in connection with a general election campaign for federal office in excess of a limitation set forth at 2 U.S.C. § 441a.

(4) Assess against defendants the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, a civil penalty of the greater of five thousand dollars ($5000) or an amount equal to 100 percent of the amounts involved in each of the violations committed, pursuant to 2 U.S.C. § 437g(a)(6)(B), for which defendants shall be jointly and severally liable;

(5) Permanently enjoin each defendant from similar future violations of the Federal Election Campaign Act of 1971, as amended; and

(6) Award the plaintiff Federal Election Commission such other and further relief as the Court deems appropriate.

Respectfully submitted,

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

Ivan Rivera
Assistant General Counsel

Charles W. Snyder
Attorney

July 5, 1989

FOR THE PLAINTIFF
FEDERAL ELECTION
COMMISSION
999 E Street, N.W.
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APPENDIX E

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

April 10, 1989

Jan W. Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 2186
Colorado Republican Federal
Campaign Committee and
Douglas L. Jones, as treasurer

Dear Mr. Baran:

You were previously notified that on January 17, 1989, the Federal Election Commission found probable cause to believe that Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Committee, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with the above-captioned matter. This determination followed the Commission's June 14, 1988, finding of probable cause to believe that the Colorado Republican Federal Campaign Committee violated these sections of the Act.

As a result of our inability to settle this matter through conciliation within the allowable time period, the Commission has authorized the General Counsel to institute a civil action for relief in the United States District Court.

Should you have any questions, or should you wish to settle this matter prior to suit, please contact Ivan Rivera, Assistant

General Counsel, at (202) 376-8200, within five days of your receipt of this letter.

Sincerely,

Lawrence M. Noble
General Counsel

APPENDIX F

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

January 17, 1989

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 2186
Colorado Republican Federal
Campaign Committee and
Douglas L. Jones, as treasurer

Dear Mr. Baran:

On June 14, 1988, the Federal Election Commission found that there is probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with an expenditure made for Wirth Facts #1 that exceeded the Act's limits at 2 U.S.C. § 441a(d). Additionally, on September 12, 1988, the Commission denied your Motion for Reconsideration of Probable Cause.

On September 29, 1988, based upon the fact that your clients had changed its treasurer prior to the Commission's probable cause determination, the Office of the General Counsel provided you with a supplemental brief regarding the General Counsel's intention to recommend to the Commission that there is probable cause to believe the current treasurer violated the above-noted sections of the Act.

On January 10, 1989, the Commission found that there is probable cause to believe Douglas L. Jones, as treasurer of the Colorado Republican Federal Campaign Committee, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f).

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within 10 days. I will then recommend that the Commission approve the agreement. Please make your check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	
Colorado Federal Campaign Committee and Douglas L. Jones as treasurer	MUR 2186

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized complaint by M. Buie Seawell on behalf of the Colorado State Democratic Party. An investigation was conducted, and the Federal Election Commission ("the Commission") found probable cause to believe that the Colorado Republican Federal Campaign Committee and Douglas L. Jones, as treasurer, ("Respondents") violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

NOW, THEREFORE, the Commission and the Respondents, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents, and the subject matter of this proceedings.

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Respondent, the Colorado Republican Federal Campaign Committee, is a political committee within the meaning of 2 U.S.C. § 431(4), and is the federal account of the Colorado Republican State Central Committee.

2. Respondent, Douglas L. Jones, is the treasurer of the Colorado Federal Campaign Committee.

3. Respondents assigned their ability to make coordinated party expenditures to the National Republican Senatorial Committee ("NRSC") on January 10, 1986.

4. Respondents' assignment precluded them from making any section 441a(d) expenditures, however, in April 1986, Respondents aired a radio ad entitled Wirth Facts #1 that contained the statement "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts," that was a section 441a(d) expenditure. The cost of this Ad was $14,549.23.

5. Respondents' reports on file with the Commission failed to report any expenditures made pursuant to section 441a(d).

6. Pursuant to 2 U.S.C. § 441a(d)(3)(A)(i), the National Committee of a political party, or a state committee of a political party, including any subordinate committee of a state committee, may not make any expenditures in connection with the general election campaign of a candidate for federal office in a state who is affiliated with such party, which exceeds in the case of a candidate for election for the Office of Senator, 2 cents multiplied by the voting age population of that state. The 1986 limitation for the Colorado Senate general election was $103,248.54.

7. Pursuant to 2 U.S.C. § 441a(f), political committees are prohibited from making expenditures exceeding the Act's limitations.

8. Pursuant to 2 U.S.C. § 434(b)(4)(H)(iv), political committees are required to report the total amount of all disbursements made under section 441a(d).

9. Pursuant to 2 U.S.C. § 434(b)(6)(B)(iv), political committees are required to report the name and address of each person who receives any expenditure from such committee in connection with an expenditure under section 441a(d), together with the date, amount and purpose of

the expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made.

V. 1. Respondents assigned to the NRSC its entire section 441a(d) limit, and were precluded from making any expenditures under this section. Respondents then made a section 441a(d) expenditure in violation of 2 U.S.C. § 441a(f).

2. Respondents failed to report the total amount of their section 441a(d) expenditures in violation of 2 U.S.C. 434(b)(4)(H)(iv) .

3. Respondents failed to itemize their section 441a(d) expenditures in violation of 2 U.S.C. § 434(b)(6)(B)(iv).

VI. 1. Respondents will amend their reports to comply with the Act's above-noted reporting requirements.

2. Respondents will pay a civil penalty to the Federal Election Commission in the amount of Four Thousand dollars ($4,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than thirty (30) days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no

other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

_____ _____

Lawrence M. Noble
General Counsel

Date

FOR THE RESPONDENTS:

_____ _____

Douglas L. Jones, Treasurer
Colorado Republican Federal
Campaign Committee

Date

APPENDIX G

FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 23, 1988

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: MUR 2186
Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer

Dear Mr. Baran:

On June 14, 1988, the Federal Election Commission found that there is probably cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv) and 441a(f), provisions of the Federal Election Campaign Act of 1971, as amended, in connection with an expenditure made for Wirth Facts #1 that exceeded the Act's limits at 2 U.S.C. § 441a(d).

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within 10 days. I

will then recommend that the Commission approve the agreement. Please make your check for the civil penalty payable to the Federal Election Commission.

If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Patty Reilly, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Conciliation Agreement

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of Colorado Federal Campaign Committee and Vincent Zarlengo, as treasurer	MUR 2186

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized complaint by M. Buie Seawell on behalf of the Colorado State Democratic Party. An investigation was conducted, and the Federal Election Commission ("the Commission") found probable cause to believe that the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, ("Respondents") violated 2 U.S.C. §§ 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), and 441a(f).

NOW, THEREFORE, the Commission and the Respondents, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents, and the subject matter of this proceeding.

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Respondent, the Colorado Republican Federal Campaign Committee, is a political committee within the meaning of 2 U.S.C. § 431(4), and is the federal account of the Colorado Republican State Central Committee.

2. Respondent, Vincent Zarlengo, is the treasurer of the Colorado Federal Campaign Committee.

3. Respondents assigned their ability to make coordinated party expenditures to the National Republican Senatorial Committee ("NRSC") on January 10, 1986.

4. Respondents' assignment precluded them from making any section 441a(d) expenditures, however, in April 1986, Respondents aired a radio ad entitled Wirth Facts #1 that contained the statement "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts," that was a section 441a(d) expenditure. The cost of this Ad was $14,549.23.

5. Respondents' reports on file with the Commission failed to report any expenditures made pursuant to section 441a(d).

6. Pursuant to 2 U.S.C. § 441a(d)(3)(A)(i), the National Committee of a political party, or a state committee of a political party, including any subordinate committee of a state committee, may not make any expenditures in connection with the general election campaign of a candidate for federal office in a state who is affiliated with such party, which exceeds in the case of a candidate for election for the Office of Senator, 2 cents multiplied by the voting age population of that state. The 1986 limitation for the Colorado Senate general election was $103,248.54.

7. Pursuant to 2 U.S.C. § 441a(f), political committees are prohibited from making expenditures exceeding the Act's limitations.

8. Pursuant to 2 U.S.C. § 434(b)(4)(H)(iv), political committees are required to report the total amount of all disbursements made under section 441a(d).

9. Pursuant to 2 U.S.C. § 434(b)(6)(B)(iv), political committees are required to report the name and address of each person who receives any expenditure from such

committee in connection with an expenditure under section 441a(d), together with the date, amount and purpose of the expenditure as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made.

V. 1. Respondents assigned to the NRSC its entire section 441a(d) limit, and were precluded from making any expenditures under this section. Respondents then made a section 441a(d) expenditure in violation of 2 U.S.C. § 441a(f).

2. Respondents failed to report the total amount of their section 441a(d) expenditures in violation of 2 U.S.C. 434(b)(4)(H)(iv).

3. Respondents failed to itemize their section 441a(d) expenditures in violation of 2 U.S.C. S 434(b)(6)(B)(iv).

VI. 1. Respondents will amend their reports to comply with the Act's above-noted reporting requirements.

2. Respondents will pay a civil penalty to the Federal Election Commission in the amount of Four Thousand dollars ($4,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than thirty (30) days from the date this agreement becomes effective to

comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

_____ _____

Lawrence M. Noble Date
General Counsel

FOR THE RESPONDENTS:

_____ _____

Vincent Zarlengo, treasurer Date
Colorado Republican Federal
Campaign Committee

APPENDIX H

FEDERAL ELECTION COMMISSION
Washington D.C. 20463

November 10, 1987

Jan Baran, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 2186
Colorado Federal Campaign
Committee and
Vincent Zarlengo, as
treasurer

Dear Mr. Baran:

Based on a complaint filed with the Federal Election Commission on June 12, 1986, and information supplied by your clients, the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, the Commission, on November 5, 1986, found that there was reason to believe your clients violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Additionally, on June 9, 1987, the Commission found reason to believe your clients violated 2 U.S.C. § 441a(d)(d)(A). The Commission instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred. Please note that the General Counsel's recommendation for probable cause to believe regarding excessive section 441a(d) spending cites to both 2 U.S.C. §§ 441a(f) and 441(d).

The Commission may or may not approve the General Counsel's recommendations. Submitted for your review is a brief stating the position of the General Counsel on the legal and

factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (10 copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request to the Commission for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Patty Reilly, the attorney assigned to handle this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Brief

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	
Colorado Federal Campaign Committee and Vincent Zarlengo, as treasurer	MUR 2186

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter arose from a complaint filed by M. Buie Seawell on behalf of the Colorado State Democratic Party. The complaint alleged the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, ("State Party") failed to report expenditures made for the purpose of influencing the 1986 general election. Specifically, the complaint noted four communications paid for by the State Party that negatively portrayed 1986 Democratic Senatorial Candidate Tim Wirth. Because these communications were said to be designed to influence voters to cast their ballots against Tim Wirth, the complaint alleged these communications were subject to the limitations of section 441a(d), and thus were required to be reported as section 441a(d) expenditures.

On November 5, 1986, the Commission found reason to believe the State Party and its treasurer violated §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) by failing to allocate and itemize one of these communications[1] as a section 441a(d) expenditure. Additionally, based on information received in the course of the investigation, on June 2, 1987, the Commission found reason to believe the State Party exceeded

[1] The Commission's reason to believe notification referred to this Ad as the "Defense Radio Ad." The State Party's response to the Commission's Interrogatories reveals the Ad was entitled "Wirth Facts #1." This latter designation is used for the purposes of this brief.

the limitations of section 441a(d)(3)(A).[2] This latter determination recognized that the State Party had assigned its ability to make coordinated party expenditures to the National Republican Senatorial Committee ("NRSC"), and that the NRSC had made such expenditures on the State Party's behalf up to the limitation of section 441a(d). Accordingly, the State Party's expenditure for Wirth Facts #1, made at a time when it was without an applicable section 441a(d) coordinated party limitation, constitutes an excessive expenditure.

II. ANALYSIS

A. The Facts

It is undisputed that on April 2, 1986, the State Party made an expenditure of $15,000 to the Colorado Media Group, Inc. for a radio production entitled "Wirth Facts #1.[3] The text of this Ad was as follows:

> Paid for by the Colorado Republican State Central Committee.
>
> Here in Colorado we're use [sic] to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon

[2] The Commission found reason to believe Respondents violated 2 U.S.C. § 441a(d)(3)(A). This section establishes limits for coordinated party expenditures, while section 441a(f) prohibits political committees from making expenditures exceeding the Act's limitations. Accordingly, the General Counsel's probable cause recommendation is that the State Party made coordinated party expenditures at a time when it lacked the ability to make such expenditures, in violation of both 2 U.S.C. §§ 441a(f) and 441a(d).

[3] Because the State Party overpaid for the Ad, on April 25, 1986, the vendor provided it with a $400.77 refund.

system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

The Ad aired over numerous Colorado radio stations prior to the August 12, 1986, primary election and followed the State Party's previously noted assignment of its section 441a(d) limitation to the NRSC.[4] To date, the State Party has never reported any section 441a(d) expenditures. As discussed below, the Ad constitutes an expenditure subject to the limitation of 2 U.S.C. § 441a(d).

B. The Law

Purusant to 2 U.S.C. § 441a(d)(3)(A)(i), the national committee of a political party, or a state committee of a political party, including any subordinate committee of a state committee, may not make any expenditures in connection with the general election campaign of a candidate for federal office in a state who is affiliated with such party which exceeds, in the case of a candidate for election to the Office of Senator, 2 cents multiplied by the voting age population of that state. The 1986 limit for the Colorado Senatorial race was $103,248. Political committees are prohibited from making expenditures exceeding the Act's limitations. 2 U.S.C. § 441a(f). The Act further requires political committees to report the total amount of all disbursements made under section 441a(d). 2 U.S.C. §434(b)(4)(H)(iv). Political committees are also required to report the name and address of each person who receives any expenditure from the committee in connection with an expenditure under section 441a(d), together with the date, amount, and purpose of the expenditure, as well as the name of, and office sought by, the candidate on whose behalf the expenditure is made. 2 U.S.C. § 434(b)(6)(B)(iv).

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[4] The Office of the General Counsel does not contest the validity of this authorization.

Additionally, the Commission has permitted state parties to assign their section 441a(d) limitations to the national party. *See Federal Election Commission* v. *Democratic Senatorial Committee*, 454 U.S. 27 (1981). The effect of this assignment is that the national party makes section 441a(d) expenditures on behalf of the state party. Such an authorization must be writing and be made prior to the time when the authorizing party has exhausted its section 441a(d) limit.

In its advisory opinions, the Commission has addressed the issue of whether certain communications are subject to the limitations of section 441a(d). The Commission has consistently taken the position that expenditures are subject to the limitations of section 441a(d) where they are made for the purpose of influencing the general election, depicit a clearly identified candidate, and convey an electioneering message. As developed below, because all three of these criteria have been met, Wirth Facts #1 is subject to the limitation of section 441a(d), and thus, the State Party exceeded the Act's expenditure limitations.

1. The Expenditure was in Connection With the General Election

In determining whether or not expenditures are made for the purpose of influencing the general election, the Commission has concluded that section 441a(d) expenditures are not necessarily restricted to the time period between nomination and election. *See* A.O. 1984-15. Rather, where a candidate appears assured of his or her party's nomination, the general election campaign, at least from the political party's perspective, may begin prior to formal nomination. The Commission has further concluded that such general election expenditures may be made in instances where the expending party is not certain of its own nominee. It is only necessary that the expenditures benefit the person eventually nominated by that party. *Id.* Therefore, if Tim Wirth was assured of his party's nomination prior to when the expenditure for Wirth Facts # 1 was made,

the State Party's anti-Wirth expenditure was for the general election.

Tim Wirth was assured of his party's nomination when Wirth Facts #1 was aired in April, 1986. Mr. Wirth was the only Democrat actively seeking his party's nomination.[5] The Colorado Democratic Party, as the complainant in this matter, considered Mr. Wirth to be the Democratic candidate in the general election prior to his formal nomination. *See* Complaint at pp. 2 and 5. Moreover, the State Party's own political director was quoted in a new account attached to the complaint stating "Wirth has been getting a free ride, while our candidates are involved in primary races." Complaint at I. Accordingly, the anti-Wirth Ad was aired when Tim Wirth was assured of his party nomination, and thus constitutes a general election expenditure.

2. Wirth Facts #1 Was An Expenditure For A Clearly Identified Candidate

There also cannot be a dispute that the Ad referred to a clearly identified candidate. Under the Act and the Commission's Regulations, a candidate is clearly identified in a communication if the name of the candidate involved appears, or his or her likeness appears, or if his or her identity is apparent by unambiguous reference. 2 U.S.C. § 431(18) and 11 C.F.R. § 106.1(d). *See also* A.O. 1985-14. The Ad refers to a person named "Tim Wirth" who is attempting to convince Colorado voters of something suggested to be untrue. Tim Wirth is further identified as an individual running for Senate. Therefore, because Wirth Facts #1 names Democratic Senatorial Candidate Tim Wirth, he is a clearly identified candidate in the Ad within the meaning of the Act and the Regulations.

---

[5] The State Party's response to the complaint noted news accounts referring to the possible candidacy of an unemployed college student who lacked a formal organization and who allegedly made expenditures totalling $600 to challenge Tim Wirth for the Democratic nomination. This rumored candidacy with minimal spending does not undercut the certainty of Mr. Wirth's nomination.

3. The Ad Contains An Electioneering Message

The Commission has further required that for an expenditure to be subject to section 441a(d) it must contain an electioneering message. An electioneering message includes statements "designed to urge the public to elect a certain candidate or party." *United States* v. *United Auto Workers*, 352 U.S. 567, 587 (1957); *see also* A.O. 1984-15, A.O. 1985-14; A.O. 1984-62.[6] As discussed below, the context and content of this Ad leads to the conclusion that it contains an electioneering message.

An examination of the context in which the Ad ran shows that Wirth Facts #1 aired in April, 1986, after Tim Wirth had announced his Senate candidacy and at a time when it was clear that no other person would actively seek the Democratic nomination. The area where the Ad aired is also relevant. The Ad played on 19 Colorado radio stations and was directed solely to people in that state. Thus, the Ad was directed to the class of persons who could cast their ballots for or against Tim Wirth. Moreover, according to news accounts attached to the complaint, the Ad circulated at a time when the State Party's political director was concerned that Tim Wirth was without primary opposition, unlike the potential Republican nominees.

The content of the Ad itself also illustrates that it contained an electioneering message. The Ad addresses Tim Wirth's positions on defense spending and the balanced budget. Respondents acknowledge these to be issues of great concern to the people of Colorado. As Respondents concede in their response, there is no question that the Ad critizes Tim Wirth's record. Indeed, Wirth Facts #1 references Mr. Wirth's record in Congress and juxtaposes that record with alleged inconsistences regarding his positions on defense spending and balanced

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[6] Included within this broad definition of electioneering message are statements of express advocacy such as "vote Republican" or "vote for Smith." Because an electioneering message is a broader standard than express advocacy, it is unnecessary to determine whether or not Wirth Facts #1 contains express advocacy.

budget, issues set forth by Mr. Wirth in his campaign ads. Moreover, the Ad explicitly notes that while running for Senate Mr. Wirth is "changing the facts." In short, attacks on the credibility of a candidate regarding issues of acknowledged public concern, based on his record and circulated in the state in which the candidate is running, lead to the obvious conclusion that the message of the Ad is that the candidate is dishonest and that voters should not support such a candidate but should instead support his opponent. Consequently, Wirth Facts #1 falls within the *United Auto Worker's* standard in that it is "designed to urge the public to elect a certain candidate or party," and thus constitutes an electioneering message.

4. Summary

As demonstrated above, Wirth Facts #1 was a general election expenditure depicting a clearly identified candidate and containing an electioneering message. Therefore, it was an expenditure subject to the limitation of section 441a(d). Because the State Party had assigned its ability to make coordinated party expenditures to the NRSC, and because the NRSC made such expenditures, the State Party was precluded from making any additional section 441a(d) expenditures. The State Party's subsequent section 441a(d) expenditures, therefore, exceeded the limitation of sections 441a(d) and 441a(f). Moreover, the State Party failed to report any section 441a(d) expenditures in violation of 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Accordingly, this Office recommends that the Commission find probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. §§ 441a(d), 441a(f), 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv).

IV. RECOMMENDATION

Find probable cause to believe the Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer, violated 2 U.S.C. § 434(b)(4)(H)(iv), 434(b)(6)(B)(iv), 441a(d) and 441a(f).

_____ _____

Date

Lawrence M. Noble
General Counsel

APPENDIX I

FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

November 13, 1986

Jan Baran, Esquire
Wiley & Rein
1776 K Street N.W.
Washington, D.C. 20006

RE: MUR 2186
The Colorado Republican
Federal Campaign Committee
and Vincent Zarlengo,
as treasurer

Dear Mr. Baran:

The Federal Election Commission previously notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on November 5, 1986, determined that there is reason to believe that your clients have violated provisions of the Act.

Specifically, it appears that the disbursements made by your clients for a radio advertisement discussing defense issues (*See* Complaint at Attachment C) were found to be expenditures in connection with the general election for senator in the State of Colorado, and thus appear to be subject to the limitations of 2 U.S.C. § 441a(d)(3)(A). Thus, the Commission found reason to believe the Colorado Republican Federal Campaign Committee and its treasurer violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Additionally, the Commission considered

allegations regarding other ads noted in the complaint, but failed to pass a motion to find reason to believe your clients violated 2 U.S.C. §§ 434(b)(4)(H)(iv) and 434(b)(6)(B)(iv) in connection with these ads.

Your response to the Commission's initial notification of this complaint did not provide complete information regarding the matters in question. Please submit answers to the enclosed questions and the requested documents within fifteen days of receipt of this letter. Statements should be submitted under oath.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, requests for pre-probable cause conciliation will not be entertained after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of General Counsel is not authorized to give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Patty Reilly, attorney assigned to this matter, at 376-8200.

Sincerely,

Joan D. Aikens
Chairman

Enclosures
Procedures
Questions and Document Request

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	}	MUR 2186
QUESTIONS AND DOCUMENT REQUEST TO:		The Colorado Republican Federal Campaign Committee and Vincent Zarlengo, as treasurer

As used in these questions and request, the terms listed below are defined as follows:

1. The terms "and" and "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of this request any answers or documents which may be otherwise construed to be out of its scope.

2. "Identify" or "identity" with respect to individuals shall mean the full name, last known residence address of such individual, the last known place of business where such individual is or was employed, and the title of the job, office or position held.

The Commission requests that you answer the following questions.

1. The complaint in MUR 2186 contains at Attachment C the text of a radio ad ("The Ad") discussing defense issues "Paid for by the Colorado Republican State Central Committee." For the Ad state:
   a. The cost of the Ad.
   b. Who paid for the Ad.
   c. If Ad was paid for by the Colorado Republican Federal Campaign Committee, state whether the cost of the Ad or any portion of the Ad has been

included in reports to the Federal Election Commission, and if so, specify where in the reports.

d. Identify the vendor(s) from whom the Ad was purchased.

2. State whether the Colorado Republican Federal Campaign Committee's "allocated share of overhead expenses" as reported on its reports filed with the Federal Election Commission contains any amounts expended in connection with the Ad noted in your responses to questions 1. If so, specify all amount(s) expended.

DESCRIPTION OF PRELIMINARY PROCEDURES FOR PROCESSING COMPLAINTS FILED WITH THE FEDERAL ELECTION COMMISSION

Complaints filed with the Federal Election Commission shall be referred to the Enforcement Division of the Office of General Counsel, where they are assigned a MUR (Matter Under Review) number and assigned to a staff member. Within 5 days of receipt of a complaint, the Commission shall notify, in writing, the respondent listed in the complaint that the complaint has been filed and shall include with such notification a copy of the complaint. Simultaneously, the complainant shall be notified that the complaint has been received and will be acted upon. The respondent(s) shall then have 15 days to demonstrate, in writing, that no action should be taken against him/her in response to the complaint.

At the end of the 15 days, the Office of General Counsel shall report to the Commission making a recommendation(s) based upon a preliminary legal and factual analysis of the complaint and any submission made by the respondent(s). A copy of respondent's submission shall be attached to the Office of General Counsel's report and forwarded to the Commission. This initial report shall recommended either: (a). that the Commission find reason to believe that the complaint sets forth a possible violation of the Federal Election Campaign Act (FECA) and that the Commission will conduct an investigation of the matter; or (b). that the Commission finds no reason to believe that the complaint sets forth a possible violation of the Federal Election Campaign Act (FECA) and, accordingly, that the Commission close the file on the matter.

If, by any affirmative vote of four (4) Commissioners, the Commission decides that it has reason to believe that a person has committed or is about to commit a violation of the Federal Election Campaign Act (FECA), the Office of General Counsel shall open an investigation into the matter. During the investigation, the Commission shall have the power to subpoena documents, to subpoena individuals to appear for deposition, and to

order answers to interrogatives. The respondent(s) may be contacted more than once by the Commission during its investigation.

If, during this period of investigation, the respondent(s) indicate a desire to enter into conciliation, the office of General Counsel staff may begin the conciliation process prior to a finding of probable cause to believe a violation has been committed. Conciliation is an informal method of conference and persuasion to endeavor to correct or prevent a violation of the Federal Election Campaign Act (FECA). Most often, the result of conciliation is an agreement signed by the Commission and the respondents. The Conciliation Agreement must be adopted by four votes of the Commission before it becomes final. After signature by the Commission and the respondent(s), the Commission shall make public the Conciliation Agreement.

[If the investigation warrants], and no conciliation agreement is entered into prior to a probable cause to believe finding, the General Counsel must notify the respondents of this intent to proceed to a vote on probable cause to believe that a violation of the Federal Election Campaign Act (FECA) has been committed or is about to be committed. Included with the notification to the respondents shall be a brief setting forth the position of the General Counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, the respondents may submit a brief posing the position of the respondent(s) and replying to the brief of the General Counsel. Both briefs will then be filed with the Commission Secretary and will be considered by the Commission. Thereafter, if the Commission determines by an affirmative vote of four (4) Commissioners, that there is probable cause to believe that a violation of the FECA has been committed or is about to be committed conciliation must be undertaken for a period of at least 30 days but not more than 90 days. If the Commission is unable to correct or prevent any violation of the FECA through conciliation the Office of General Counsel may recommend that the Commission file a civil suit against the respondent(s) to enforce the

Federal Election Campaign Act (FECA). Thereafter, the Commission may, upon an affirmative vote of four (4) Commissioners, institute civil action for relief in the District Court of the United States.

See 2 U.S.C. § 437g, 11 C.F.R. Part 111

APPENDIX J

TITLE 2 U.S.C. § 441a (1994)

Limitation on contributions and expenditures

(a) *Dollar limits on contributions.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and

among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that

(A) nothing is this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts;

(B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and

(C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if

(i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices;

(ii) the limitations contained in this Act on contributions by persons are not exceed by such transfer; and

(iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in co-operation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign

committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(b) *Dollar limits on expenditures by candidates for office of President of the United States.*

(1) No candidate for the office of President of the United States who is eligible under section 9003 of title 26 (relating to condition for eligibility for payments) or under section 9033 of title 26 (relating to eligibility for payments) to receive payments from the Secretary of the Treasury may make expenditures in excess of—

(A) $10,000,000 in the case of a campaign for nomination for election to such office, except the aggregate of expenditures under this subparagraph in any one State shall not exceed the greater of 16 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section), or $200,000; or

(B) $20,000,000 in the case of a campaign for election to such office.

(2) For purposes of this subsection—

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of

Vice President of the United States shall be considered to be expenditures made by or on behalf of the candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(c) *Increases on limits based on increases in price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (b) of this section and subsection (d) of this section shall be increased by such percent difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year of 1974.

(d) *Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(e) *Certification and publication of estimated voting age population.*

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) *Prohibited contributions and expenditures.*

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(g) *Attribution of multi-State expenditures to candidate's expenditure limitation in each State.*

The Commission shall prescribe rules under which any expenditure by a candidate for presidential nominations for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(h) *Senatorial candidates.*

Notwithstanding any other provision of this Act, amounts totaling not more than $17,500 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

Title 2 U.S.C. § 437f (1994)

Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.*

Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by-

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon an provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.*

The Commission shall make public any requests made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

APPENDIX K

11 C.F.R. CH. 1
(1995)

§ 110.7 Party committee expenditure limitations (2 U.S.C. 441a(d)).

(a)(1) The national committee of a political party may make expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.

(2) The expenditures shall not exceed an amount equal to 2 cents multiplied by the voting age population of the United States.

(3) Any expenditure under this paragraph (a) shall be in addition to--

(i) Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and

(ii) Any contribution by the national committee to the candidate permissible under § 110.1 or § 110.2.

(4) The national committee of a political party may make expenditures authorized by this section through any designated agent, including State and subordinate party committees.

(5) The national committee of a political party may not make independent expenditures (see part 109) in connection with the general election campaign of a candidate for President of the United States.

(6) Any expenditures made by the national, state and subordinate committees of a political party pursuant to 11 CFR 110.7(a) on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8.

(b)(1) The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party.

(2) The expenditures shall not exceed--

(i) In the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of--

(A) Two cents multiplied by the voting age population of the State; or

(B) Twenty thousand dollars; and

(ii) In the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(3) Any expenditure under paragraph (b) shall be in addition to any contribution by a committee to the candidate permissible under § 110.1 or § 110.2.

(4) The party committees identified in (b)(1) shall not make independent expenditures in connection with the general election campaign of candidates for Federal office.

(c) For limitation purposes, State committee includes subordinate State committees. State committees and subordinate State committees combined shall not exceed the limits in paragraph (b)(2) of this section. To ensure compliance with the limitations, the State committee shall administer the limitation in one of the following ways:

(1) The State central committee shall be responsible for insuring that the expenditures of the entire party organization are within the limitations, including receiving reports from any subordinate committee making expenditures under paragraph (b) of this section, and filing consolidated reports showing all expenditures in the State with the Commission; or

(2) Any other method, submitted in advance and approved by the Commission which permits control over expenditures.

(2 U.S.C. 438(a)(8), 441a, 441d, 441e, 441f, 441g, 441h, 441i)

[41 FR 35948, Aug. 25, 1976, as amended at 45 FR 15119, Mar. 7, 1980; 45 FR 27435, Apr. 23, 1980; 45 FR 43387, June 27, 1980]

APPENDIX L

RADIO ADVERSTISEMENT

Text of the First Republican Anti-Wirth Radio Spot, re: defense.

Paid for by the Colorado Republican State Central Committee

Here in Colorado we're use to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have the right to change the facts.

PAMPHLET

"It's absolutely criminal the amount of money this country is spending on defense."

Congressman Tim Wirth
The Rocky Mountain News
May 29, 1983

Tim Wirth is the kind of politician who wants it both ways. He wants the liberal, anti-defense crowd back in Washington to know that they can count on him when it comes time to kill any effort to modernize our military. That's why in Congress, he's voted against every major new weapons system in the past five years. But back here in Colorado he wants folks to believe that he thinks America should have the best system of national defense that money can buy. Which is the real Tim Wirth? Check the record inside.

You can't change the facts, Tim.

Tim Wirth Says He Wants A Strong Defense For America?

Then Why Doesn't He Vote That Way?

Tim Wirth is spending a lot of money these days to try and convince people in Colorado that he really wants our country to have a strong, modern military ready to defend our borders and our friends abroad.

☒ NO Wirth voted against the Strategic Defense Initiative program to protect America against Russian missiles (Congressional Quarterly 164. June 28, 1985)

☒ NO Wirth voted against building the new B-1 bomber to replace the outmoded B-52's that have been in our airforce since the Korean War (Congressional Quarterly 148. May 23, 1984)

☒ NO Wirth voted against funding important defense weapons 48 times since 1975 (The Congressional Record)

Thousands of dollars in slick television ads may change a few minds, but it can't challenge the facts.

Take a look at how Tim Wirth has voted on issues in Congress that directly affect the strength of our defense systems.

☒ YES Wirth sponsored legislation to allow people who objected to the military not to have their tax dollars pay for national defense (HR 3032 July 17, 1985)

☒ YES Wirth voted to protect draft dodgers from having their college aid cut off by the Federal Government. (Congressional Quarterly 211, July 28, 1982)

☒ YES Wirth voted to cut $108 million from civil defense programs designed to protect our military personnel (Congressional Quarterly 215 July 29, 1982)

[Photos Omitted in Printing]

RADIO ADVERTISEMENT

[The following is a transcript of the Republican party ad re: Tim Wirth and telephones, first aired on KOA Radio, May 2, 7:25 a.m.]

* * *

Ringing phone.

Voice: "When it comes to telephone service, a lot has changed in the last few years--none of it for the better."

Operator Voice: "Thank you for calling the telephone company. Please hold."

Voice: "Before Tim Wirth thought it would be a good idea to break up the phone company, you could solve your problems with a single call. Now, you buy your phone at the hardware store, long distance from one company, local service from someone else, and pay three separate bills. I guess Tim Wirth didn't think about that when he was leading the fight to bust up the best telephone system in the world."

Operator Voice: "Equipment, service, or billing?"

Voice: "Well, I'm not sure."

Operator Voice: "Then please continue holding."

Voice: "One thing is obvious: Tim Wirth's bright ideas about breaking up the phone company have led to higher rates, and lots of confusion. So it's no surprise Tim Wirth is trying to deny his role in the AT&T breakup. He may get away with that in Washington, but people in Colorado have long memories. You can't change the facts, Tim."

Operator Voice: "Are you still there?"

Voice: "Just tell the folks this spot was paid for by the Colorado Republican State Central Committee."

Dial tone.

* * *

PAMPHLET

Confused About The Break Up Of The Telephone Company?

The Voter Education Project
Colorado Republican Party
Denver, Colorado

Everyone I have spoken with thinks that the AT&T divestiture has been a disaster and that the Congressman (Tim Wirth) had a lot to do with it . . . if people hold him personally responsible for the telephone break up, he's going to have big problems."

Columnist David Ethan Greenberg
The Denver Post
January 12, 1986

Tim Wirth **does** have big problems.

People in Colorado are having big problems getting the kind of phone service they deserve and at a fair price.

With Tim Wirth's support and encouragement America's phone system was broken up.

The result is that we all pay more and pay for things we used to get for free, like directory information.

Tim Wirth wants you to forget the role he played in busting up AT&T.

He wants you to believe that it's all a mistake and he had nothing to do with it.

It won't work.

Coloradans are smarter than that.

You can't change the facts, Tim.

Paid for by the Colorado Republican State Central Committee

So Is The Man Who Worked The Hardest To Make It Happen Congressman Tim Wirth

A lot of people wonder why it was necessary to bust up one of the most efficient communications systems in the world, the telephone company.

Now a lot of folks are hopping mad over poor service, confusing choices between companies and most of all, HIGHER PHONE BILLS!!

What about the man who did more than any other member of the U.S. House of Representatives to try and make it happen?

Well, like a lot of politicians, Tim Wirth starts to change his tune when things go wrong.

As the chairman of the key Congressional subcommittee responsible for the legislation to break up AT&T, Tim Wirth called the splitting up of the national phone network, **"a positive first step."**

Today, with people discovering what tearing apart the phone company means in terms of their pocketbooks and peace of mind. Tim Wirth is singing a new song.

It was all "unnecessary," he says. "Too far, too fast."

That's the style of some politicians. They wheel and deal and when things turn sour, they want you to forget they ever had anything to do with it.

It may be fashionable in Washington, D.C. to turn your back and walk away from a mess you helped create.

That's not the way we do things in Colorado.

You can't change the facts, Tim.

RADIO ADVERTISEMENT

[The following is a transcript of a State Committee radio broadcast discussing Congressman Wirth's position on telecommunications policy]

* * *

Ringing phone.

Voice: "When it comes to telephone service, a lot has changed in the last few years—none of it for the better."

Operator Voice: "Thank you for calling the telephone company. Please hold."

Voice: "Before Tim Wirth thought it would be a good idea to break up the phone company, you could solve your problems with a single call. Now, you buy your phone at the hardware store, long distance from one company, local service from someone else, and pay three separate bills. I guess Tim Wirth didn't think about that when he was leading the fight to bust up the best telephone system in the world."

Operator Voice: "Equipment, service, or billing?"

Voice: "Well, I'm not sure."

Operator Voice: "Then please continue holding."

Voice: "One thing is obvious: Tim Wirth's bright ideas about breaking up the phone company have led to higher rates, and lots of confusion. So it's no surprise Tim Wirth is trying to deny his role in the AT&T breakup. He may get away with that in Washington, but people in Colorado have long memories. You can't change the facts, Tim."

Operator Voice: "Are you still there?"

Voice: "Just tell the folks this spot was paid for by the Colorado Republican State Central Committee."

Dial tone.

* * *

RADIO ADVERTISEMENT

[The following is a transcript of the State Committee's radio broadcast discussing Congressman Wirth's positions on defense]

Paid for by the Colorado Republican State Central Committee

Here in Colorado we're use to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.

Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

RADIO ADVERTISEMENT

[The following is a transcript of a State Committee radio broadcast discussing Congressman Wirth's position on telecommunications policy and on the credibility of his statements on the issue]

Paid for by the Colorado Republican State Central Committee

There is a lot of controversy over Tim Wirth and the telephone break-up. He says he didn't have anything to do with it. So what's the issue? Credibility, that's the issue. Prior to the break-up, Congressman Wirth held twenty five official hearings, generated eight volumes of hearing transcripts, sponsored two versions of telephone break-up legislation and then Wirth even wrote a letter to the Federal Judge saying the Wirth Bill H.R. 5158 gave "legislative sanction to the divestiture." That's what Tim Wirth said. And AT&T just told the *Rocky Mountain News* "Wirth may have said later that breaking up the phone company was a bad idea, but as far as we could tell that's what his bill ultimately would have done." So what's the issue when it comes to Tim Wirth and the phone company? Credibility. Tim Wirth's credibility. Tim Wirth can continue to leave out facts about his role, but he can't change the facts."

PAMPHLET

Tim Wirth Says He Wants A Strong Defense For America?

Then Why Doesn't He Vote That Way?

Tim Wirth is spending a lot of money these days to try and convince people in Colorado that he really wants our country to have a strong, modern military ready to defend our borders and our friends abroad.

☒	NO	Wirth voted against the Strategic Defense Initiative program to protect America against Russian missiles (Congressional Quarterly 164. June 28, 1985)
☒☒	NO	Wirth voted against building the new B-1 bomber to replace the outmoded B-52's that have been in our airforce since the Korean War (Congressional Quarterly 148. May 23, 1984)
☒☒☒	NO	Wirth voted against funding important defense weapons 48 times since 1975 (The Congressional Record)

Thousands of dollars in slick television ads may change a few minds, but it can't challenge the facts.

Take a look at how Tim Wirth has voted on issues in Congress that directly affect the strength of our defense systems.

☒	YES	Wirth sponsored legislation to allow people who objected to the military not to have their tax dollars pay for national defense (HR 3032 July 17, 1985)
☒☒	YES	Wirth voted to protect draft dodgers from having their college aid cut off by the Federal Government. (Congressional Quarterly 211, July 28, 1982)

☒☒☒ YES Wirth voted to cut $108 million from civil defense programs designed to protect our military personnel (Congressional Quarterly 215 July 29, 1982)

[Photos Omitted in Printing]

"It's absolutely criminal the amount of money this country is spending on defense."

Congressman Tim Wirth
The Rocky Mountain News
May 29, 1983

Tim Wirth is the kind of politician who wants it both ways. He wants the liberal, anti-defense crowd back in Washington to know that they can count on him when it comes time to kill any effort to modernize our military. That's why in Congress, he's voted against every major new weapons system in the past five years. But back here in Colorado he wants folks to believe that he thinks America should have the best system of national defense that money can buy. Which is the real Tim Wirth? Check the record inside.

You can't change the facts, Tim.

PAMPHLET

Confused About The Break Up Of The Telephone Company?

The Voter Education Project
Colorado Republican Party
Denver, Colorado

So Is The Man Who Worked The Hardest To Make It Happen Congressman Tim Wirth

A lot of people wonder why it was necessary to bust up one of the most efficient communications systems in the world, the telephone company.

Now a lot of folks are hopping mad over poor service, confusing choices between companies and most of all, **HIGHER PHONE BILLS!!**

What about the man who did more than any other member of the U.S. House of Representatives to try and make it happen?

Well, like a lot of politicians, Tim Wirth starts to change his tune when things go wrong.

As the chairman of the key Congressional subcommittee responsible for the legislation to break up AT&T, Tim Wirth called the splitting up of the national phone network, **"a positive first step."**

Today, with people discovering that tearing apart the phone company means in terms of their pocketbooks and peace of mind. Tim Wirth is singing a new song.

It was all "unnecessary," he says. "Too far, too fast."

That's the style of some politicians. They wheel and deal and when things turn sour, they want you to forget they ever had anything to do with it.

It may be fashionable in Washington, D.C. to turn your back and walk away from a mess you helped create.

That's not the way we do things in Colorado.

You can't change the facts, Tim.

Everyone I have spoken with thinks that the AT&T divestiture has been a disaster and that the Congressman (Tim Wirth) had a lot to do with it . . . if people hold him personally responsible for the telephone break up, he's going to have big problems."

Columnist David Ethan Greenberg
The Denver Post
January 12, 1986

Tim Wirth **does** have big problems.

People in Colorado are having big problems getting the kind of phone service they deserve and at a fair price.

With Tim Wirth's support and encouragement America's phone system was broken up.

The result is that we all pay more and pay for things we used to get for free, like directory information.

Tim Wirth wants you to forget the role he played in busting up AT&T.

He wants you to believe that it's all a mistake and he had nothing to do with it.

It won't work.

Coloradans are smarter than that.

You can't change the facts, Tim.

Paid for by the Colorado Republican State Central Committee